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APPENDIX TO PETITIONER'S BRIEF

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. [redacted]176

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

versus

SUNRISE LUMBER & TRIM CORP., RESPONDENT.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Chronological List of Relevant Docket Entries.

In the Matter
of
SUNRISE LUMBER & TRIM CORP.
and
LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL.

Case No. 2-CA-4406

5.25.55	Charge filed by Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL (hereinafter called Local 282).
6.13.55	First amended charge filed by Local 282.
8.30.55	Complaint and notice of hearing issued by Acting Regional Director.
9. 2.55	Extension of time for Respondent to file answer issued by the Acting Regional Director.
9.29.55	Regional Director's telegram rescheduling hearing from October 3, 1955 to October 25, 1955, dated.
10.24.55	Regional Director's telegram rescheduling hearing from October 25, 1955 to November 9, 1955, dated.
11. 9.55	Hearing opened.
11. 9.55	Respondent's answer to complaint received.
11.10.55	Hearing closed.

12.15.55 Trial Examiner Hunt's Intermediate Report and Recommended Order issued.

12.15.55 Order transferring case to the National Labor Relations Board issued.

1.19.56 Respondent's exceptions to the Intermediate Report and Recommended Order and request for oral argument received by the Board.

3.21.56 Board's Decision and Order issued.

5. 9.56 Respondent's motion to reopen record for purpose of submitting additional evidence, newly discovered, and upon receipt of such evidence, for an Order dismissing complaint received.

6. 1.56 Board's Order denying Respondent's motion to reopen record, etc. issued.

General Counsel's Exhibit 1-G.

COMPLAINT

It having been charged by Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, 265 W. 14th Street, New York 11, New York, herein called Local 282, that Sunrise Lumber & Trim Corp., Sunrise Highway, Massapequa, New York, herein called Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, hereinafter referred to as the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Acting Regional Director for the Second Region, designated by the Board's Rules and Regulations—Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

General Counsel's Exhibit 1-G.

F. (a) A copy of the Charge in this proceeding was served by registered mail upon Respondent on May 24, 1955.

2. Respondent is, and has been at all times herein mentioned, a corporation duly organized under and existing by virtue of the laws of the State of New York.

3. At all times herein mentioned, Respondent has maintained its principal office and place of business at Sunrise Highway, Massapequa, New York, herein called the plant, and is now and has been continuously engaged at said plant and place of business in the manufacture, sale and distribution of lumber, milled products, building supplies, and related products.

4. During the past year Respondent, in the course and conduct of its business operations, caused to be purchased, transferred and delivered to its plant, lumber, insulation, sheet rock, flooring, and other goods and materials, valued at in excess of $650,000, of which, goods and materials valued at in excess of $585,000, were transported to said plant in interstate commerce directly from states of the United States other than the State of New York.

5. Respondent is, and has been at all times material herein, engaged in commerce within the meaning of Sections 2 (6) and (7) of the Act.

6. Local 282 is, and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

7. Since on or about February 1, 1955, Respondent, through its agent, Francis J. Tursi, has interfered with, restrained and coerced, and is interfering with, restrain-

ing and coercing, its employees in the exercise of rights guaranteed in Section 7 of the Act, by the following conduct:

(a) On or about March 16, 1955, Respondent interrogated its employees concerning their membership in, activities on behalf of and sympathy in Local 282.

(c) On or about March 25 and 26, 1955, and on various unknown dates during the period from March 26 to April 19, 1955, Respondent threatened its employees with discharge or other reprisals if they became or remained members of Local 282 or gave any assistance or support to it.

(d) On or about March 25 and 26, 1955, and on various unknown dates during the period from March 25 to April 19, 1955, Respondent, offered and promised to its employees wage increases, health insurance, shorter hours of work, vacations and other benefits or improvements in their terms and conditions of employment, if they refrained from becoming or remaining members of Local 282 or giving any assistance or support to it.

8. All truck drivers and yardmen, employees of Respondent employed at its plant exclusive of salesmen, millhands, part-time employees, and all supervisors as defined in Section 2(11) of the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

9. On or about March 19, 1955, a majority of the employees of Respondent in the unit described above in paragraph 8, designated or selected Local 282 as their representative for the purposes of collective bargaining with Respondent.

10. At all times since March 19, 1955, Local 282, has been the representative for the purposes of collective bargaining of a majority of the employees in the unit described above in paragraph 8, and, by virtue of Section 9(a) of the Act, has been and is now the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment.

11. On or about March 19, 1955, and on March 25, 1955, Local 282 requested Respondent to bargain collectively with respect to rates of pay, wages, hours of employment and other terms and conditions of employment with Respondent as the exclusive collective bargaining representative of all the employees of Respondent in the unit described above in paragraph 8.

12. On or about March 19 and 25, 1955, and at all times thereafter Respondent did refuse and continues to refuse to bargain collectively with Respondent as the exclusive collective bargaining representative of all the employees in the unit described above in paragraph 8.

13. On or about March 25, 26, 31 and April 1, 1955, and, on various unknown dates during the period from March 25 to April 19, 1955, Francis J. Tursi, President of Respondent, threatened its employees in the unit described above in paragraph 8 with reprisals and offered them rewards and benefits as described above in paragraph 7, because of their membership in and activities on behalf of Local 282, and in order to undermine Local 282, and destroy its majority.

14. On or about March 25, 26, 31 and April 1, 1955, and, on various unknown dates during the period from March 25 to April 19, 1955, Francis J. Tursi, President of Re-

spondent, has, by way of reprisals and offers of benefits, solicited striking employees engaged in a strike, described below in paragraph 15 to return to work and to abandon Local 282, thereby undermining the Respondent and destroying its majority.

15. Since on or about March 25, 1955 to date, the employees of Respondent employed at the plant in the unit described above in paragraph 8 ceased work concertedly and went out on strike.

16. The strike described above in paragraph 15, was caused by the unfair labor practices of Respondent, described above in paragraphs 7, 12, 13 and 14, and was prolonged by the unfair labor practices described above and/or below in paragraphs 18 and 19.

17. On or about June 10, 1955, and on June 21, 1955, the following employees employed by Respondent at the plant who had engaged in the strike or other activities referred to above in paragraphs 15, and 16, applied for reinstatement to their former or substantially equivalent positions or employment:

Arthur Messina	John Honer
Alexander Petrillo	Silvester Cassillo
George Stephan	Anthony Addeo

18. Since on or about June 10, 1955, Respondent has refused and continues to refuse to reinstate the employees named above in paragraph 17 to their former or substantially equivalent positions or employment.

19. Respondent did refuse and continues to refuse to reinstate the employees named above in paragraph 17, for the reason that said employees had joined or assisted Local 282, or engaged in other concerted activities for the

purpose of collective bargaining or mutual aid or protection and/or had participated in the strike described above in paragraphs 15 and 16.

20. By the acts described above in paragraphs 7, 12, 13, 14, 18 and 19, and by each of said acts, Respondent did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

21. By the acts described above in paragraphs 18 and 19, and by each of said acts, Respondent did discriminate and is discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization and Respondent thereby did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

22. By the acts described above in paragraphs 12, 13, 14, and 19, and by each of said acts, Respondent did refuse to bargain collectively and is refusing to bargain collectively with the representatives of its employees, and thereby did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

23. The activities of Respondent described above in paragraphs 7, 12, 13, 18 and 19 occurring in connection with the operations of Respondent described above in paragraphs 2, 3, and 4, have a close, intimate and substantial relation to trade, traffic and commerce among the several states (and with foreign countries), and tend to lead to labor disputes burdening and obstructing commerce and

the free flow of commerce and constitute unfair labor practices affecting commerce with the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Act.

JAMES A. JAFFEE,
JAMES A. JAFFEE, *Acting Regional Director,*
National Labor Relations Board.
2 Park Avenue,
New York 16, New York.

General Counsel's Exhibit 2A.

11/9/55 WH

I, the undersigned employee of the Sunrise Lumber Co. hereby authorize the Drivers & Chauffeurs Union, Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, affiliated with the American Federation of Labor, to make an agreement with my employer, requiring membership in said labor organization as a condition of employment.

Date: Mar. 19, 1955.

(Signed) A. M. PETRILLO,
DRIVERS & CHAUFFEURS UNION, LOCAL 282.

265 West 14th Street, New York 11, N. Y. CHelsea 3-0124

(Union Label) 285

General Counsel's Exhibit 2B.

WH 11/9/55

I, the undersigned employee of the Sunrise Lumber Co. hereby authorize the Drivers & Chauffeurs Union, Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, affiliated with the American Federation of Labor, to make an agreement with my employer, requiring membership in said labor organization as a condition of employment.

Date: 3/19/55.

(Signed) GEORGE STEPHAN

DRIVERS & CHAUFFEURS UNION, LOCAL 282,

265 West 14th Street, New York 11, N. Y. CHelsea 3-0124

(Union Label) 285

General Counsel's Exhibit 2C.

WH 11/9/55

I, the undersigned employee of the Sunrise Lumber Co. hereby authorize the Drivers & Chauffeurs Union, Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, affiliated with the American Federation of Labor, to make an agreement with my employer, requiring membership in said labor organization as a condition of employment.

Date: 3/19/55.

(Signed) ARTHUR MESSINA.

DRIVERS & CHAUFFEURS UNION, LOCAL 282.

265 West 14th Street, New York 11, N. Y. CHelsea 3-0124

(Union Label) 285

General Counsel's Exhibit 2D.

WH 11/9/55

I, the undersigned employee of the Sunrise Lumber Co. hereby authorize the Drivers & Chauffeurs Union, Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, affiliated with the American Federation of Labor, to make an agreement with my employer, requiring membership in said labor organization as a condition of employment.

Date: 3-19-55.

(Signed) JOHN HONER,
DRIVERS & CHAUFFEURS UNION, LOCAL 282.

265 West 14th Street, New York 11, N. Y. CHelsea 3-0124

(Union Label) 285

General Counsel's Exhibit 2E.

WH 11/9/55

I, the undersigned employee of the Sunrise Lumber Co. hereby authorize the Drivers & Chauffeurs Union, Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, affiliated with the American Federation of Labor, to make an agreement with my employer, requiring membership in said labor organization as a condition of employment.

Date: 3/19/55.

(Signed) ANTHONY ADDEO,
DRIVERS & CHAUFFEURS UNION, LOCAL 282.

265 West 14th Street, New York 11, N. Y. CHelsea 3-0124

(Union Label) 285

General Counsel's Exhibit 2F.

WH 11/9/55

I, the undersigned employee of the Sunrise Lumber hereby authorize the Drivers & Chauffeurs Union, Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, affiliated with the American Federation of Labor, to make an agreement with my employer, requiring membership in said labor organization as a condition of employment.

Date: 3/23/55

(Signed) SILVESTER CASSILLO,
DRIVERS & CHAUFFEURS UNION, LOCAL 282

265 West 14th Street, New York 11, N. Y. CHelsea 3-0124

(Union Label) 285

General Counsel's Exhibit 3A.

(Copy)

SAMUEL J. COHEN
COUNSELLOR AT LAW
50 East 42nd Street
New York 17, N. Y.

SAMUEL J. COHEN
HENRY WEISS

MURRAY HILL 2-6077

June 10, 1955

Sunrise Lumber & Trim Corp.
Massapequa, Long Island.

Gentlemen:

On behalf of Local 282, demand is hereby made upon you for the unconditional reinstatement to your employ-

ment of Alexander M. Petrillo, George Stephani, John Honer, Silvester Casillo and Arthur Messina.

Very truly yours,

SAMUEL J. COHEN

SJC:TAK

General Counsel's Exhibit 3B.

June 19, 1955

Samuel J. Cohen, Esq.
50 East 42nd Street
New York 17, New York.

Dear Sir:

Your letter of June 10th, 1955 to Sunrise Lumber and Trim Corporation in which you demand reinstatement of five individuals, has been referred to me for attention.

If you will telephone me, I will be pleased to discuss with you the contents of your letter.

Very truly yours,

ALEXANDER ELTMAN

AE:LR

General Counsel's Exhibit 3C.

(Copy)

SAMUEL J. COHEN
COUNSELLOR AT LAW
50 East 42nd Street
New York 17, N. Y.

SAMUEL J. COHEN
HENRY WEISS

MURRAY HILL 2-6077

June 21, 1955

Sunrise Lumber & Trim Corp.
Massapequa, Long Island

Gentlemen:

On June 10, 1955 I wrote you as follows on behalf of Local 282:

> "On behalf of Local 282, demand is hereby made upon you for the unconditional reinstatement to your employment of Alexander M. Petrillo, George Stephan, John Honer, Silvester Casillo and Arthur Messina."

Up to this date I have received no answer.

Will you kindly let me hear from you by return mail.

Very truly yours,

SAMUEL J. COHEN

SJC:TAK
Reg. Ret. R. R.

Respondent's Exhibit 1.

The Respondent, SUNRISE LUMBER & TRIM CORP., as and for its answer to the complaint herein, alleges:

1. Denies each and every allegation in the complaint contained in paragraphs numbered 7, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23.

2. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs numbered 6, 9 and 10.

Wherefore, said Respondent demands that the complaint herein be dismissed.

ALEXANDER ELTMAN,
Attorney for Respondent,
Sunrise Lumber & Trim Corp.,
350 Fifth Avenue,
New York 1, N. Y.

Respondent's Exhibit 2.

JOHN O'ROURKE, President CHelsea 3-0124

TRUCK DRIVERS, CHAUFFEURS AND HELPERS
LOCAL No. 282
Affiliated with the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA
American Federation of Labor and State Federation of Labor

(Registered Emblem)

Truck Drivers, Chauffeurs
and Helpers
LOCAL UNION No. 282
Headquarters and Office
259-265 West 14th St.
Room 702

LUMBER INDUSTRY

(Union Label)

New York 195:

AGREEMENT entered into between the firm of .....
.....
party of the first part, and the Building Material Local 282 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, party of the second part; to govern all hours and conditions herein set forth from the first day of July 1953 to the thirtieth day of June 1955.

SECTION 1. The wages of automobile chauffeurs shall be sixteen dollars and forty-eight cents ($16.48) per day. Helpers and yardmen shall receive fourteen dollars and forty-eight cents ($14.48) per day. Drivers of six wheeler

(three axle) tractors and trailers shall receive one dollar ($1.00) per day additional. This does not apply to bulk material. Overtime shall be paid at the rate of time and one half for all hours over eight hours per day and forty hours per week. Any man ordered to work on Saturday shall be paid at the rate of time and one half. All new wages rates shall be retroactive to July 1, 1953.

* * *

IN WITNESS WHEREOF, the parties hereto have set their hands and affixed their seals the day of the year written above.

BUILDING MATERIAL LOCAL 282 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. of L.

FOR THE FIRM OF:

.....

.....

(Address)

.....

.....

.....

(Countersigned)

.....

WITNESS

Stenographic Transcript of Testimony at Hearing of November 9, 1955.

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
SECOND REGION

In the Matter
of:
SUNRISE LUMBER & TRIM CORP.,
and
LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL.

Case No. 2-CA-4406.

2 Park Avenue,
New York, N. Y.,
November 9, 1955.

Met, pursuant to notice, at 10 a. m.

Before: A. Bruce Hunt, Trial Examiner.

Appearances:

Lewis Moore, Esq., 2 Park Avenue, New York, N. Y., Counsel for General Counsel.

Samuel J. Cohen, Esq., By: Donald S. Winograd, Esq., of Counsel, 50 East 42nd Street, New York, N. Y., appearing for Local 282.

Alexander Eltman, Esq., 350 Fifth Avenue, New York, N. Y. and Joseph T. King, Esq., 33 West 42nd Street, New York, N. Y., appearing for Respondent, Sunrise Lumber.

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PROCEEDINGS.

* * *

9

Trial Examiner: On the record.

* * *

Trial Examiner: Will your give the reporter a duplicate of your Exhibit No. 1.

Mr. Moore: There is also no issue concerning the status of the labor organization filing the charge.

* * *

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Trial Examiner: On the contrary, I think that is denied in the answer.

Mr. Eltman: No, sir, what I did was this: I denied having knowledge or information sufficient to form a belief, but I will state for the record now that I will not seriously challenge the status of the labor organization as a labor organization within the meaning of the Act.

Mr. Moore: Will you stipulate that it is?

Mr. Eltman: I will gladly stipulate.

Trial Examiner: You join the stipulation?

Mr. Winograd: Yes, sir.

JOHN CODY, a witness called by and in behalf of the General Counsel, having been first duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Moore) * * *

Q. Are you an officer of Local 282? A. I am a business agent of Local 282.

Q. How long have you been a business agent? A. Well, about three years now.

Q. In March of this year did you see any employees of Sunrise

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Lumber and Trim Corp.? A. I did.

Q. Will you tell us where you first saw them and whom you saw? A. At the Massapequa Diner I spoke to—

Q. Where is that, Massapequa, Long Island? A. Massapequa, Long Island.

Q. (By Mr. Mogre) On what day of the week was that? A. On a Friday night.

Q. Do you know the date? A. March 18, I believe was the date.

Q. Friday night about what time? A. About seven o'clock, I believe.

Q. Which employees of Sunrise Lumber did you speak to at that time? A. George Stephan.

Trial Examiner: Spell each name, please.

The Witness: George Stephan, Al M. DeTrillo, and

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Messina is the other fellow—I forget his first name.

Q. What happened at that time? A. They had told me that they wanted to get themselves organized into 282, and I told them they'd have to sign pledge cards to that effect, which they did.

Q. Did they sign cards at that time? A. They did.

Q. Did they sign in your presence? A. Those three fellows did.

Q. (By Mr. Moore) I show the witness General Counsel's Exhibit 2-A for identification. A. That is right.

Q. Was that the card that was signed by DeTrillo in your

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presence? A. It was.

Q. (By Mr. Moore) Will you tell us again where General Counsel's Exhibit 2-A was signed? A. In the Massapequa Diner, Massapequa, Long Island.

Q. Was it signed in your presence? A. Yes, it was.

Q. What date did you say that you met at the diner? A. March 18th. Now, my only explanation for the date being wrong there is that inadvertently we thought it was the 19th, that Friday night, and rather than change them we left them as was. We decided amongst ourselves to leave it

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remain the 19th.

Q. Did you meet at any other times at the Massapequa Diner? A. Yes, once later on in the following week.

Trial Examiner: The record may show that my calendar fixes March 18th this year as a Friday.

Q. (By Mr. Moore) I show the witness General Counsel Exhibit 2-B for identification; was that signed in your presence? A. It was.

Q. Where was that? A. In the Massapequa Diner.

Trial Examiner: At the same time and place?

The Witness: Same time and place.

Q. (By Mr. Moore) General Counsel 2-C for identification, was that also signed at the same time and place?

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A. The same time and place, Massapequa Diner.

Q. You have stated that you met these three men at the diner that night? A. That is correct.

Q. What did you later do with these cards?

The Witness: I took them home.

Q. (By Mr. Moore) Then ultimately what did you do with them, did you give them to somebody? I have them here in my possession now; did you give them to some agent of this office, or did you mail them in? A. I gave them to a fellow here—I am not sure, I am not quite sure what I—whether I gave them to our lawyer or a fellow, Schneider, I believe.

Mr. Moore: All right. I want the record to show that these exhibits have on the back of each the stamp of the NLRB, Second Regional Office, showing they were received on March 24, in this office.

I offer them in evidence at this time.

Trial Examiner: Is there any objection?

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Mr. Eltman: I am not going to object to the admission of these documents as cards which at one time was in the possession of the witness and turned over to the Board. I would like it specifically understood that by failing to object to the admission of them I am not in any way conceding the authenticity of the cards themselves, or the signatures or anything contained thereon, nor am I in any way conceding that they are pledge cards within the meaning of the term as used by the Board.

Trial Examiner: All right, I receive in evidence General Counsel's Exhibits 2-A, 2-B and 2-C.

(Thereupon, the documents above-referred to were

marked General Counsel's Exhibits 2-A, 2-B, and 2-C in evidence.)

* * *

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Q. (By Mr. Moore) When after the Friday night meeting did you obtain additional cards? A. Saturday morning, the following day.

Q. From whom did you obtain such cards? A. A man named Addeo.

Q. Are these the cards that you obtained—I show the witness General Counsel 2-E and 2-D for identification. A. Yes, these are the two cards that he told me—

Q. Who gave those cards to you? A. Addeo.

Q. What did he say to you? A. He said, "Here is my card and Honer's card."

Q. He gave you Honer's card also? A. That is correct.

Q. Where did he give those cards to you? A. Right in the Sunrise Lumber & Trim yard.

* * *

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Mr. Moore: I offer these two cards into evidence at this time, General Counsel's Exhibits 2-D and 2-E.

Mr. Eitman: I object, No. 1, to the receipt of 2-D and 2-E, on the ground that no proper foundation has been laid as to both of those cards. And further, if they are accepted, it is with the same reservation I made with respect to 2-A, B and C.

Trial Examiner: I receive in evidence General Counsel's Exhibit 2-E. I reject General Counsel's Exhibit 2-D at this time, and it may be reoffered if and when Honer takes the stand.

* * *

Q. (By Mr. Moore) Now, did you at any subsequent date receive any other cards? A. Yes.

Q. When was that? A. I believe it was the same night, Saturday night. I am not quite sure of that. It may be, it may have been a few days later. We had a meeting with the five drivers involved.

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and the yard man: Casillo came into the diner and he agreed to sign his pledge card, which he did.

Q. Did he sign it in your presence? A. He did.

Q. That was at the Massapequa Diner, the same one? A. That is right.

Q. Who was present at that time? A. I believe Honer was present, Casillo, of course Casillo, Stephan, and it was either Addeo or Massina—I may be wrong about either one of the two, but there was five of the six that were present. One was still working, that is why he couldn't be there.

Q. I show you, the witness, General Counsel's Exhibit 2-F: now, is that the card that Mr. Casillo signed in your presence and gave to you? A. It is.

Q. At the Massapequa Diner? A. Right.

Mr. Moore: I will offer General Counsel's Exhibit 2-F in evidence.

Mr. Eltman: I will not object, but I will make the same reservation with respect to 2-F as I have made with respect to 2-A, B and C.

Trial Examiner: You do not object?

Mr. Eltman: No objection.

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Trial Examiner: If I understand you correctly, your position is that by not objecting you do not agree that the cards bear authentic signatures, nor do you concede that they are cards which properly designate

the labor organization to represent the purported signers?

Mr. Eltman: Yes, and in addition I do not concede that they were signed on the date indicated on the card.

Trial Examiner: All right.

Is General Counsel Exhibit 2-F offered?

Mr. Moore: Yes, sir, it is.

Trial Examiner: I receive it in evidence.

(Thereupon, the document above-referred to was marked General Counsel's Exhibit 2-F in evidence.)

Q. (By Mr. Moore) Now, I ask the witness whether the date there is March 23rd?

* * * *

The Witness: I said that could very well be the correct date. I mean, we had meetings, you know, and I am not quite sure of the date.

Q. (By Mr. Moore) Did you have several meetings at the Massapequa Diner? A. Yes, we had two that I know of.

Q. After the meeting of the 18th at the Massapequa Diner, did

you speak to Mr. Tursi, owner of Sunrise Lumber? A. Yes, I did.

Mr. Moore: May we have a stipulation that Mr. Tursi is the president?

Trial Examiner: I believe that appears in Respondent's Exhibit No. 1 for identification.

Mr. Eltman: Yes.

Trial Examiner: He is the gentleman who signed it, is he not?

Mr. Eltman: Yes.

Mr. Moore: Right.

Q. (By Mr. Moore) When did you first see Mr. Tursi? A. The next day, Saturday the 19th.

Q. Where did you see him? A. In his yard.

Q. What time of the day? A. Well, I'd—around eight, 8:30, nine o'clock, it was in the morning.

Q. Who was present at the time you spoke to him? A. No one, really, outside of the customers in the place. I didn't know them by name.

Q. Did you have a conversation with Mr. Tursi? A. I did.

Q. Will you tell us what was said by you and by him? A. I went over to him. After I—I had five of the cards,

and I told him that I was there to represent the men, and try to organize his business. He wanted to see the cards, and I refused—I showed them to him, but he wanted to look at them, which I wouldn't let him do.

Finally I took a contract out of my pocket; I said, "This is the thing we are looking for," and he says, "You better give that to my lawyer."

And he blew his top: He said, "Get the hell off my property"; he took his jacket off—

Mr. Eltman: I object to the phrase, "He blew his top" as the conclusion of the witness.

The Witness: That is not—

Trial Examiner: Just a moment, strike the phrase. I will ask you to tell us as well as you recall exactly what was said by you and by Mr. Tursi, but do not characterize what he said in your own words as blowing his top. You understand me?

The Witness: Yes.

Trial Examiner: Just tell us as well as you can recall what the conversation consisted of.

The Witness: Well, when I offered him the contract he told me that I had better give it to his lawyer, that this was, as far as the union was concerned, they would never get in here, in no business; and that this was a free country, and he had his rights not to belong to any union.

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I told him that the employees had certain rights, too, that they were entitled to join the union if they so desired.

Well, he finally told me to "Get the hell out and stay the hell out."

I in turn told him I'd be back; and that was the end of our conversation, as well as I can remember.

Q. (By Mr. Moore) Mr. Tursi was seated during this conversation? A. No.

Q. Was he standing? A. He was standing.

Q. Did he do anything, make any motions or any gesticulations? A. Well, he did take his jacket off.

Q. Did he say anything at that time? A. He didn't—he was just hollering about—

Trial Examiner: Keep your voice up.

The Witness: He was just hollering out that this is a free country, "It is against my religion." In the meantime he was taking off his jacket, not that he threatened me in so far as violence was concerned, but the implication was there.

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Mr. Eltman: I object to the witness' conclusion and characterization.

The Witness: Well, one man—

Trial Examiner: Just a moment. Strike the latter portion of the answer, beginning with the words "not that he threatened me."

Now, let's get another question.

Mr. Moore: Yes, sir.

Q. (By Mr. Moore) He took his jacket off, and when he took his jacket off what was he saying to you? A. It was against his religion to be unionized by anyone or anything. At that point he went into the office—

Trial Examiner: Now, just a minute. Wait until you get another question.

The Witness: Okay.

Trial Examiner: Let me suggest this, and I think it will facilitate matters: listen to the questions carefully, and confine your answer to the question; be as brief as you can, and then wait on the next question.

The Witness: Okay, I will try it.

Q. (By Mr. Moore) He told you to get the hell off the property? A. Yes.

Q. Are those the words he used?

A. Yes.

Q. When he said that was he standing still, did he walk about, did he move—what did he do? A. Well, he raised his arm (indicating), "get the hell off of my property and stay off."

Trial Examiner: The witness illustrates by raising his right arm with the forefinger extended, and pointing toward the ceiling.

Q. (By Mr. Moore) What did you say to him at that point? A. I told him that I would be back, and walked, and walked off, left there.

Q. You told Mr. Tursi, using your words, you wanted to organize his shop, did you mention any particular group of employees? A. Yes. Well, he asked me.

Q. Tell us exactly what you said.

Mr. Eltman: Excuse me one second: I object to the question on the ground that counsel for the Board has not properly rephrased, or phrased, the answer given previously by the witness. The witness did not testify before that he was trying to organize Mr. Tursi's shop.

Trial Examiner: The witness may tell us what the witness said in connection with representing employees. Go ahead.

The Witness: In the course of our conversation in the

yard, when I first went up to him, that is when I told him that I was in there to organize the truck drivers. He had asked me, "Who are you going to organize?"

I said, "I am here to organize the truck drivers and the one yard man that you have."

And then at that point—if I may go further—

Trial Examiner: I think you have answered the question.

Q. (By Mr. Moore) Was there any further discussion at that time of the group of employees, which classifications, and so forth? A. Yes, sir. He asked me did I have the cards, the pledge cards. I took them out; I says: "I have got the six of them."

Trial Examiner: The what?

The Witness: The six of them.

Trial Examiner: Keep your voice up.

The Witness: That is when he—well, got a little—I shouldn't be jumping to conclusions.

Trial Examiner: Keep your voice up.

Read the last answer.

(Last answer read.)

The Witness: In other words, if I may say—

Trial Examiner: No, let's hear the question again.

Q. (By Mr. Moore) Now, it was your testimony before on identification of these cards that you obtained five cards by

the 19th? A. That is right. Yes, that is right.

Q. I just want you to tell the truth here now about what you said to Tursi about how many you represented. A. I did tell Tursi I had the sixth, which I did not have. I had the five, with the intent that I was getting the sixth.

Mr. Eltman: I object to the latter part of that answer as calling for the operation of the witness' mind.

Trial Examiner: At the time that you talked with Mr. Tursi—

The Witness: Yes.

Trial Examiner: —had you talked with the sixth employee?

The Witness: No.

Trial Examiner: Did you have any information that led you to believe that you would obtain the card of the sixth employee?

The Witness: Yes.

Trial Examiner: What was that information?

The Witness: The men told me that Casillo had agreed to sign, and would be at the next meeting to sign.

Trial Examiner: Is he the sixth man?

The Witness: Yes, he is the sixth man.

Trial Examiner: I will let the testimony stand.

Q. (By Mr. Moore) You stated that you left Mr. Tursi's

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presence at that time? A. Yes.

Q. When did you next see Mr. Tursi? A. I can't remember the exact date, but it was about a week later.

Q. What day of the week; can you remember? A. I believe it was a Monday.

Trial Examiner: Excuse me, won't you, please, before you go to another subject matter?

Mr. Moore: Sure.

Trial Examiner: I want to ask the witness one point on the last subject. You testified that you showed the cards to Mr. Tursi, but would not let him see them?

The Witness: Yes.

Trial Examiner: Now, clarify that for us, won't you; how did you show them to him and yet not let him see them?

The Witness: He wanted to see the signatures.

Trial Examiner: You talk out, so the reporter and counsel can hear you.

The Witness: I am trying to do the best I can.

Mr. Moore: Look at me now, and just keep your voice up.

The Witness: I will just have to rest a minute, if you don't mind.

Trial Examiner: What did you say?

The Witness: I will just have to rest a moment.

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Trial Examiner: That is all right. After you answer this question I want a recess myself.

The Witness: He wanted to look at the signatures. I would not let him look at the signatures. I let him look at the cards at a distance of, say, four or five feet, and I flipped them like a deck of cards.

Q. (By Mr. Moore) When did you next see Mr. Tursi?

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A. About a week later.

Q. Where did you see him? A. In front of his yard.

Q. What time of day? A. About seven o'clock in the morning.

Q. You have stated that the first meeting was in March, can you give us the date of the second meeting, about when it was? A. I—I think it was the 25th.

Q. The 25th of March? A. Yes.

Q. What time of day? A. 7 a. m.

Q. Did you have any conversation with Mr. Tursi—just answer yes or no? A. Yes.

Q. Who was present during that conversation? A. All six fellows that signed pledge cards.

Q. Will you tell us what happened when you arrived at the lumber yard that morning, when you saw Mr. Tursi and what you said to him and what he said to you—everything that happened? A. I arrived there about 7 a. m. I spoke to the six fellows that signed the pledge cards, and they told me that they wanted to go on strike if necessary in order that the

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union should be recognized by Mr. Tursi.

Shortly thereafter Mr. Tursi came along in his car, blowing the horn, by the way, pulls into his, the front of his yard. I walked over to his car—it is about 10 feet from where we were standing—and he asked me what I was doing there.

Q. Had he gotten out of his car, or was he still in his car? A. No, he was sitting in his car.

I said, "Well, I am here to represent the men, the men claim they are willing to go out on strike, if necessary, to be recognized."

He said he didn't believe it, but he would speak to the men themselves.

So he got out and he walked over to them. I walked with him, and he asked each individual there if it was so, that they were going into the union.

The men said it was. In particular, DeTrillo said that "we are tired of working 60 hours a week at straight time, and we feel that the union, by getting us organized, can benefit us a hell of a lot more."

At this point he turned to me and he asked me if I had any meetings with the men, and I said yes, I did.

He said, "Well, do you mind if I have a meeting with the men privately?"

So I looked at the men. They didn't object; so I said, "I don't object."

He took them into his office. They went with him, they agreed to go with him, and they were in there about an hour.

They also took a copy of my contract, one of our contracts.

Q. Who took the contract? A. They sent out—I believe Honer was sent out for it. I am not sure of the individual that was sent out for the contract.

Q. But one of the men later came out? A. Later came out with a copy—for the copy.

Q. Did you give it to him? A. I did.

Q. Did they go back inside? A. They went back inside.

Q. Continue telling us what happened. A. After the hour or so was up they came out and they told me that as far as they were concerned they were still going to stick with the union.

I said, "Well, here is the signs, the picket signs."

And they took turns walking up and down picketing the place.

Q. How long did you remain there at the lumber yard that morning?

A. All morning.

Q. All morning? A. Yes.

Q. Did you have any further conversation with Mr. Tursi that morning? A. No.

Q. Have you had any subsequent meetings with him? A. No.

Q. Have you at any time spoken to him since that date? A. No, not one word.

Q. You have testified concerning everything that you told Mr. Tursi and that Mr. Tursi told you; do you recall anything else that he said to you concerning representation of the union?

Trial Examiner: At any time, or just on this last.

Q. Just on this last occasion or the first occasion or other occasion? A. Well, there were other parts of conversation which I don't recollect. And the reason I don't recollect, I feel, is that it had minor implications one way or the other.

Q. You don't recall anything else? A. No, I don't recollect offhand anything else.

Q. Then you have told us everything that you now recall that was said on those occasions by Mr. Tursi? A. I believe so, I believe so.

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Q. Did he at any time ever ask you whether you had represented or did represent at any time anybody other than the drivers and the yard men?

Mr. Eltman: Excuse me, sir: I object to the question on the ground that it is leading. The counsel has secured from the witness the admission that anything else that might have been said was of minor implication. I see no need of counsel to lead the witness in this fashion.

Trial Examiner: Read the question, please, Mr. Reporter.

(Last question read.)

Trial Examiner: You may answer.

Q. (By Mr. Moore) Do you understand the question? A. No, would you kindly repeat it?

Q. Let me rephrase it.

When you spoke to Mr. Tarst on those two occasions in March you testified that you told him that you had represented the drivers and the yard man? A. That is right.

Q. Did he on either of those occasions ask you whether you represented any of the other employees in his lumber yard? A. No.

Mr. Eltman: Excuse me: I was going to object to the question on the ground that the question of counsel assumes facts not in the record, and is not an accurate reflection of

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the witness' testimony thus far.

Trial Examiner: There is a variance between the earlier testimony and this question in the following respects: the witness testified that he claimed to represent the truck drivers and one yard man.

whereas counsel in his question refers to drivers and the yard man. Now, the variance may be insignificant, but on the other hand there may be employees who are drivers rather than truck drivers.

Mr. Moore: Thank you. I meant to say, or I fully meant, truck drivers.

Mr. Eltman: Even with that correction I will still press my objection.

The Witness: I—

Trial Examiner: Just a moment.

Reframe the question.

Q. (By Mr. Moore) Do you know whether Mr. Tursi employed other classifications of workers in his plant and lumber yard? A. Yes.

Q. What other classifications did he employ, to your knowledge? A. Well,—

Trial Examiner: I think we will get to that when we come to the varying contentions on the appropriate unit, and when we come to the payroll. You may now get back to your

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question.

Mr. Moore: All right.

Q. (By Mr. Moore) Any other classifications, other than truck drivers and yard men mentioned by Mr. Tursi on either of the two occasions? A. No, he said—I told him—

Q. The answer is no?

Trial Examiner: He has answered it. It is no.

CROSS EXAMINATION:

Q. (By Mr. Eltman) Mr. Cody, I just wanted to get a little clarification with respect to your first meeting

concerning the display of the cards. Now, I believe you testified you took some cards out of your pocket and you held them at a distance from Mr. Tursi. Did you tell him at that time how many cards you had? A. I told him I had six.

Q. You told him you had the six cards? A. Now—

Q. Hold it a second. Actually you only had five in your hand; is that right? A. That is correct.

Q. But you told him that you had six? A. Let me put it this way: I told him I had the sixth man.

Q. How many cards did you tell him you had?

A. Now, let me clarify myself, if you don't mind.

Q. Would you just answer my question. A. I had five cards in my hand.

Q. Did you hold them in such a position that Mr. Tursi could count off one, two, three, four, five; or were they bunched together? A. Well, I flipped them, you know how you take a deck—

Q. It was a rapid flip? A. No, I put them right in front of his face, about four feet away, because I didn't want him to grab them.

Q. Was it possible for him to count the cards? A. Well, that is not for me to say.

Q. Did you want him to believe at that time that you did have the sixth? A. No, I had no ulterior motive.

Mr. Moore: Objection. It is totally immaterial and irrelevant as to what he wanted Mr. Tursi to believe.

Trial Examiner: The answer may stand.

Q. (By Mr. Ehman) In any event, you told him you represented the six men? A. That is right.

Q. At that time you only had five cards; is that correct? A. Yes.

Q. Did you have any other designation beyond these cards that the sixth man had authorized you to bargain for him?

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A. All I used as far as the sixth man was concerned was the word of the men who had already signed.

Q. You had not spoken to the sixth man? A. Not yet.

Q. Nor had you gotten anything in writing from him? A. Not at that point.

Q. So that your statement to Mr. Tursi that you represented six men was not completely accurate? A. No.

Q. Is that correct? A. Well, I thought it was accurate; but—

Trial Examiner: There is a difference, perhaps, in the witness' mental processes as to what constitutes the designation of his labor organization, on the one hand, and what in fact constitutes a designation or in law constitutes a designation on the other hand.

Q. Mr. Tursi, he did ask you to see the cards though, didn't he? A. He wanted to see the signatures.

Q. Did you at that time give him the copy of your contract? A. I tried to, but he wouldn't—he says, "Give it to my lawyer."

Q. Did you ask him for his lawyer's name? A. He didn't tell me.

Q. I didn't ask you that: did you ask him for his lawyer's

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name? A. No, I did not.

Q. Did you take the contract out of your pocket? A. I did.

Q. What did you tell him the document was? A. I told him this was our contract.

Q. This was what? A. This was our contract. This was what we were asking for.

Q. You let him read it? A. He wouldn't take it.

Q. Did you tell him this was the contract you expected him to sign? A. No, I did not.

Q. What did you tell him that the document was? A. I told him, "This is what we are asking for," as far as our contract was concerned.

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Trial Examiner: Can you further describe this contract you had at the time you talked with Mr. Tursi?

The Witness: Well, you mean the wording of it?

Trial Examiner: Let me ask you this: was it a form contract?

The Witness: Yes, it was.

Trial Examiner: A contract which had not been signed by our labor organization or any other employer?

The Witness: That is right.

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Trial Examiner: Mr. Cody, I show you Respondent's Exhibit No. 2 for identification, and ask you if this is the type of document which you had upon the occasion you talked with Mr. Tursi?

The Witness: This is correct.

Trial Examiner: I ask you also if this is the type of document which, according to your testimony,

you gave to one of the employees who came out of Mr. Tursi's office and asked for a document on or about March 25th?

The Witness: That is right.

Trial Examiner: Does the respondent have any questions with respect to this Exhibit No. 2?

Mr. Eltman: No. As a matter of fact, I would like to offer it in evidence.

Trial Examiner: That was my next question, but I thought counsel might inquire about it initially if they cared to.

Do you have any questions about it?

Mr. Moore: No, sir.

Trial Examiner: I receive in evidence Respondent's Exhibit No. 2 for identification.

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(Thereupon, the document above-referred to was marked Respondent's Exhibit 2 in evidence.)

Mr. Eltman: May I ask a question on the document?

Trial Examiner: Yes.

Q. (By Mr. Eltman) With respect to Respondent's Exhibit 2 in evidence, that was at the time you spoke to Mr. Tursi the standard Local 282 contract; is that correct? A. We tried to get that, that is true.

Q. For the lumber industry? A. For the lumber industry.

* * *

Trial Examiner: Mr. Cody, you testified that on or about March 25th the men came out of the plant or the office after talking to Mr. Tursi and put on picket signs?

The Witness: That is correct.

Trial Examiner: Did anyone picket?

The Witness: Yes, they all—

Trial Examiner: All right, the answer is yes.

The Witness: Yes.

Trial Examiner: Who picketed?

The Witness: I believe all six started picketing at once, immediately. It was—

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Trial Examiner: Who wore or carried picket signs?

The Witness: Well, see, they were in groups of threes. One group would go this way, the other group would come this way, and they'd take turns in passing the sign to each other.

That was for the first few hours. Then we decided to give the fellows a blow, or as we call it, or coffee time, and soon, until we finally—

Trial Examiner: You are getting beyond my question.

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JOHN HONER, a witness called by and in behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Moore) Were you formerly employed by Sunrise Lumber? A. Yes, sir.

Q. When did you first go to work for Sunrise? A. About August or September of 1944.

Q. Who hired you? A. Mr. Tursi, I suppose, although I spoke to Al Faleiano most of the time.

Q. When you applied for employment there, to whom did you speak? A. Mr. Tursi.

Q. What did he tell you? A. He told me I would have to speak to Al Falciano.

Q. Did he tell you where Al Falciano was working? A. Falciano was working in the yard at the time. I waited

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about 15 minutes, and he was free at the moment, and he talked for 10 or 15 minutes.

Q. When was that, with reference to when you went to work? A. That was before I went to work.

Q. How much before? A. One week.

Q. (By Mr. Moore) Will you tell us what conversation you had with Falciano? A. Falciano asked me what I had done previous, what I was doing at the time in the way of employment, and what I had done previous to that in the line they were interested in; which was millwork. I explained to Al Falciano what I had done, and after about 15 minutes Mr. Tursi came over and asked Mr. Al Falciano, "Will he do?"—I believe that was his phrasing. Falciano said, "Yes," so Mr. Tursi asked me when I might report.

I told him that I was working at the time and that I would like to give my previous employer about a week's notice. He asked if I could come to work the next day, but I told him no, so we settled on the week's notice for my previous employer.

Q. So you reported to work one week later after you had spoken to Mr. Tursi? A. Yes, sir.

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Q. And Mr. Al Falciano— A. Falciano.

Q. What did you do, what job did you work on when you came to work? A. I was an assistant to Al Falciano, who was in charge of the mill, and made whatever Falciano instructed me to.

Q. How many men working in the mill at that time? A. Only he and I.

Q. Just you and Falciano? A. Yes.

Q. How long did you continue working in the mill? A. Approximately two or three months.

Q. During the two or three months there what did Falciano instruct you to do, what did you do? A. Well, we made cabinets, and so forth. He did most of the fine work, and I was a helper. And we would construct cabinets for kitchen and scallops for cornices, and the like of that.

And I also made fence sections or fence posts for fences, which were sold by Mr. Tursi.

Q. Can you think of any other duties that you performed in the mill at that time? A. No, not that I recall.

Q. Did you work anywhere on the premises of Sunrise Lumber other than in the mill?

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A. Yes, on a Saturday they—it was required, if business was that brisk, they might call Al Falciano and I out of the mill to wait on some customers, until the situation was in hand again, and the normal men that took care of the customers could handle it again.

And of course now and then I might have to unload a truck or stack some lumber, which was not very often.

Trial Examiner: Is it your contention that this witness is the yard man?

Mr. Moore: No, sir, I am leading up to the crucial date, which was in March, by showing that

this witness when he was hired performed certain duties, and I will bring out testimony showing the duties of mill hands, and yardmen and truck drivers, on the other hand, to contrast those duties.

Trial Examiner: Which one is the yardman, according to your contention?

Mr. Moore: I believe Addeo, in March. Was that correct?

The Witness: Yes, sir.

Q. (By Mr. Moore) You stated you worked on that job for two or three months? A. That is right.

Q. Then were your duties changed? A. Yes.

Q. Who changed those duties?

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A. Mr. Ruiz, the foreman.

Q. Is that Frank Ruiz? A. Frank Ruiz.

Q. When was that that he changed them? A. About December Mr. Ruiz asked me if I wanted to drive a truck instead of working in the mill. I told him that it was all right with me, so he said I then would become a truck driver and not work in the mill. And he assigned me to a truck.

Q. That was in about December of 1954? A. 1954.

Q. Did you start immediately to drive a truck? A. That day.

Q. Were there any other truck drivers there at that time? A. I believe every one not well, I might not say every one of them but most of the men were there, as we all, as a rule, ate lunch in the mill, being it was cold, we had lunch there, and he asked me at lunch time when we were eating, and I don't recall exactly who was there and who was not, although there were at least six or seven there.

Q. When you became a truck driver, were there any other truck drivers driving trucks? A. Yes, sir.

Q. Who were they? A. DeTrillo.

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Q. (By Mr. Moore) Will you tell us who the drivers were when you became a driver? A. DeTrillo, Messina, Stephan, and at that time we had another driver, who I recall his name at the moment.

Q. In March, at the time of the strike, who were the truck drivers? A. DeTrillo, Messina, Casillo, Stephan.

Q. And yourself? A. And myself.

Q. What kind of trucks did you drive? A. We drove stake-bodied trucks as a rule. There was one small panel, small rack-bodied truck, which was more of a special delivery truck.

Q. Were there any other employees; other than the five you have named, who drove trucks in March, 1955? A. No, sir.

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Q. (By Mr. Moore) Was there any other equipment there that the drivers used in March of 1955? A. They, as I have previously stated, on a Saturday it was naturally much busier than a normal day, and required they would have a driver or whoever was in the yard, Falgiano or the yardman, on the saws, to saw up lumber, if required, or sell the lumber from the racks to yard customers who came in with cash-and-carry business.

Q. That was on Saturday, you say? A. That was on Saturdays, mostly, and now and then during the day we might handle the saws to cut up lumber.

Q. The saws? A. Yes.

Q. Did the—

Mr. Eltman: Did the witness say during the day or during the week?

The Witness: During the week.

Q. (By Mr. Moore) But as a regular thing these five men drove trucks, is that right? A. That is right.

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Q. (By Mr. Moore) Now, you have stated that you used saws occasionally on Saturday as part of your duties? A. Yes.

Q. What kind of saw—

Mr. Eltman: Excuse me one second. I object to the question as not being a complete question and an accurate reflection of the witness' testimony. The witness specifically said, "On occasion during the week, too."

Mr. Moore: All right, if the witness said it, I will stick to that.

Trial Examiner: He did say occasionally during the week.

Q. (By Mr. Moore) What kind of saws, handsaws or power saws? A. Power saws.

Q. Cross-cut power saws? A. Cross-cut, or the saws were adapted to turning to rip, which might be required if we did not have the size lumber in stock that the order called for.

Q. Were there any yardmen working there in March? A. Addeo was the yardman.

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Mr. Eltman: Excuse me, sir, I object to the question unless we have a definition of what a yard-

man is and unless it is shown that the witness knows what a yardman is.

Mr. Moore: I will clear it up.

Trial Examiner: He has identified Addeo as a yardman. Let him now tell us what were the duties of Addeo.

Q. (By Mr. Moore) What were his duties? A. Addeo was in the yard. He did not drive the trucks, and he handled lumber, and unloaded and loaded trucks, and operated the Hi-lift machine.

Trial Examiner. The what?

The Witness: The Hi-lift machine, it is a lift truck.

Q. (By Mr. Moore) Do you think of anything else that Addeo did? A. He waits on customers in the yard, also.

Q. What do you mean waited on them? A. These cash and carry customers who came in for lumber, which they took out in their own car or truck, he loaded their vehicle.

Q. Would he make out the order, or was the order given to him by somebody? A. No, the order was made up in the office, and a duplicate was brought out by the customer, and the order was filled from that slip which came from the office.

Q. By Addeo?

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A. By Addeo.

Mr. Eltman: Excuse me, sir—well, never mind, it has been answered. I wanted to make sure that there was no confusion concerning the use of the term "made up." Did counsel mean when he said

"made up" the writing out of the order, or the actual filling of the order?

Mr. Moore: The writing out of the order.

Mr. Eltman: All right.

Q. (By Mr. Moore) the order then was filled by Addeo? A. Yes, sir.

Q. In filling the order what would he do? A. He would take from stock whatever was on that slip, the—for instance, two pieces of 1 by 4—and then he would go to the next item and lay it all out, or put it in the person's car, depending upon how much material it was.

Q. If an order required some sawing, would Addeo operate the power saw to saw the material? A. If it was an item, for instance, where he had to cut a piece off to make the length—but if it was any intricate order, as a scallop or a cabinet or whatever it might be, he would not do that. It would only be minor sawing, which would be right at the moment.

Q. During March of 1955, will you tell us what you would do during the course of a week? A. I was assigned this truck, and they made deliveries and

sometimes pickups, where the material had to be exchanged.

Q. Who would tell you what to pick up and exchange? A. The foreman, Frank Ruiz, would tell us in the morning what we were to do.

Q. Who would he tell? A. The ones in the yard, the five drivers and Addeo.

Q. Would he tell you in a group, or separately? A. Might tell us in a group, or he might tell us separately. And the—when I was not driving a truck—

Q. Tell us first, about how much of your time during the course of a week was spent in driving a truck? A. Well, I would say about 60 per cent, or more.

Q. You have stated that you loaded and unloaded lumber; is that correct? A. Yes.

Q. How much of your time was spent in doing that? A. Well, unloading and loading lumber varied from week to week, but I would say five to 10 per cent of my time.

Trial Examiner: Are you talking about loading and unloading from the truck?

Mr. Moore: That is what I am going to clear up now.

Q. (By Mr. Moore) Where would the loading and unloading take place? A. In the yard or at our—at a siding in Amityville, Long Island, where the freight cars would come in with lumber, and

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Mr. Frank Ruiz would assign the, as a rule, two men, sometimes three, to go down and unload the freight car, and sometimes it might be myself, and another man or two, and at other times it might be another combination of men.

And I also made fences at that time.

Q. Before we get into that, when you say another group of men or combination of men, whom do you mean?

Tell us what would happen in the course of a typical week, who would load and unload lumber? A. Well, if there was a freight car in this week—as a rule it amounted to one a week; sometimes there would be two in a week—and Mr. Ruiz would assign the two of us, or three of us, to the freight car—possibly myself, Addeo, and DeTrillo, as an example.

Q. Anybody else that he might assign to it; that he regularly did assign to it? A. Oh, and then he might assign Stephan, DeTrillo and Casitlo; and then another time he might assign another combination of the six of us.

Q. There was always the six of you? A. Yes, sir.

Q. Did he ever assign a millhand to unload lumber from a freight car, to your knowledge? A. No, sir.

Q. You have testified as to truck driving, and as to your

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loading and unloading lumber; how did you spend the balance of your time? A. I also made fences for the company when I was not driving the truck.

Q. And during March how much of your time was spent in that occupation? A. I would say, 20; 20 or 30 per cent, possibly, of my time?

Q. Who would assign you to do that? A. Mr. Ruiz.

Q. And when you were performing that duty, who was your supervisor? A. Mr. Ruiz.

Q. Where was the work performed? A. In the yard.

Q. In the yard itself? A. In the yard itself.

Q. What machinery was used in that? A. A power saw, and a portable scintilla, it is called, it is sort of a portable jigsaw.

Q. It is located in the yard; is it? A. Yes, sir.

Q. During March were there any employees employed in the mill? A. Yes, sir.

Q. What were their names?

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A. Al Faleiano—

Mr. Eltman: Excuse me: is that one name, Al Faleiano? In other words, his last name was Faleiano?

The Witness: That is right.

Trial Examiner: That is my understanding.

The Witness: Faleiano, and he had another fellow in the name, his name was Walter something—I don't recall his last name.

Trial Examiner: Counsel for the respondent?

Mr. Eltman: Yes, I will try to help him out on that. Was it Walter Lehman?

The Witness: Possibly. I believe that was his name.

Mr. Eltman: Take our word, it was.

Q. (By Mr. Moore) Do you know what Falciano's rate of pay was? A. I believe $100 a week.

Q. And do you know whether Walter was or was not a carpenter?

Mr. Eltman: Excuse me, I object to the question, because I don't think the last question can ever be answered. I think there will be an eternal struggle over a clear-cut definition of carpenter, so let's not try to get this witness to answer it. He is far from the expert on the subject of what is a carpenter.

Mr. Moore: A carpenter is a well-defined category.

Trial Examiner: Let's ascertain Lehman's duties.

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Q. (By Mr. Moore) When you were working in the mill and before you became a truck driver was Walter working there at any time? A. No, he was not.

Q. Do you know when he was hired? A. Approximately February, thereabouts.

Q. Will you tell us what your duties were when you worked in the mill?

Trial Examiner: He has already told us that, I think.

Mr. Eltman: I believe he has.

Trial Examiner: He started out at the beginning of his testimony. Would you like to ask him if his duties were the same as the witness' duties after the witness was employed.

Mr. Moore: Yes, sir.

I didn't hear all of what you said. May I have that read back.

Trial Examiner: Would you like to ask the witness whether Lehman's duties were the same as the witness' duties prior to the time the witness became a truck driver?

Mr. Moore: Yes, sir.

Q. (By Mr. Moore) Do you know whether Walter Lehman performed the same duties at the mill after you became a truck driver that you performed prior to your becoming a truck driver? A. He did not.

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Q. What did he perform after you became a truck driver? A. He worked in the mill and made cabinets, scallops and the sink tops, and whatever orders came in, into the yard, which naturally were varied, sometimes; but the majority of the work was cabinets and once in a while, possibly a trellis, or some odd item like that.

Q. What kind of cabinets? A. Kitchen cabinets, or more or less like these breakfronts, or the bars and finished work.

Q. Finished cabinet work; is that it? A. Yes.

Q. Would you say that he is a cabinet maker?

Mr. Eltman: I object to the question as calling for a conclusion on the part of the witness, a conclusion which he is not qualified to give.

Trial Examiner: You may answer.

The Witness: I think I would consider him so.

Q. (By Mr. Moore) You have testified concerning your duties during the course of a week in March, 1955; will you tell us whether the duties of the other drivers there differed from your own duties, and if so, in what respect? A. The difference between myself and the other drivers was no different in respect to that if I was not driving a

truck I might be making fences; otherwise our duties were the same.

Q. And the other drivers did not make fences; is that what you

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are saying? A. Yes.

Q. Did Walter Lehman ever make fences, to your knowledge, during March of 1955? A. I believe one time I recall he made some fence posts, but that is the only time I recall.

Q. Once? A. Yes.

Q. Can you recall when that occurred? A. Possibly in February.

Q. Now, you have testified concerning the five truck drivers, and one yard man—by the way, do you know whether the yard man ever made fences? A. He had helped me a few times, possibly two or three times, put some fence sections together.

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Q. (By Mr. Moore) Do you know what his rate of pay was in March of 1955?

Mr. Eltman: I object to that on the ground that it is completely immaterial; secondly, on the ground that the witness is not qualified to answer.

Trial Examiner: Do you know? You may answer.

The Witness: I believe it was $110 a week.

Trial Examiner: Well, the question is whether you know— I will strike the preceding answer.

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Now, you can answer yes or no, whether you know the man's salary or wage during March.

The Witness: Yes.

Mr. Moore: May the witness answer and then give an explanation of it?

The Witness: Yes.

Trial Examiner: What is the basis of your knowledge; do you know?

The Witness: The—because we were all paid possibly at the same time—in groups, when the bookkeeper would tell whoever was in the yard to come in for their pay, we might go in in a group of two or three, and at that time that I recall Mr. Ruiz and I were paid right at the same moment.

Trial Examiner: And you saw how much he was paid; is that what you mean?

The Witness: Yes, sir.

Trial Examiner: All right, how much was he paid?

The Witness: $110.

Q. (By Mr. Moore) Was that the amount of money that your saw him paid, or was it a check that was given to him? A. That was the amount of money he was paid, before withholding.

Q. Before withholding—

Mr. Eltman: I move to strike on the ground that it is not responsive.

Trial Examiner: Strike it. The question is whether he

was paid by cash or by check.

The Witness: He was paid by check.

Q. (By Mr. Moore) Now, what was your rate of pay during March, 1955? A. $85 a week.

Q. Do you know what the other drivers were paid? A. Yes, sir.

Q. Will you tell us, please? First, you made $85 a week; how much did Stephan make? A. Pardon me? Who?

Q. George Stephan. A. $80.

Q. Casillo? A. $85.

Q. Massina? A. $85.

Q. DeTrillo? A. $80.

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Q. (By Mr. Moore) Mr. Honer, I show you General Counsel's Exhibit 2-D for Identification; is that your signature there? A. It is.

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Q. (By Mr. Moore) Will you tell us where and when you signed that document? A. I signed it in the yard, Sunrise Lumber Yard, and gave it to Anthony Addeo.

Q. And is that about the date you signed it? A. That is.

Q. March 19, 1955? A. The 19th or 20th, right in the vicinity.

Mr. Moore: You have seen this.

Mr. Eltman: Can you fix the time?

Q. (By Mr. Moore) What time of day was that? A. I believe it was in the afternoon. I can't be sure of that.

Q. Were you working at the time? A. I was.

Mr. Moore: I will offer General Counsel Exhibit 2-D for Identification into evidence.

Mr. Eltman: No objection; but with the reservation as I have expressed concerning other exhibits of the same nature.

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Trial Examiner: I receive it.

(Thereupon, the document above-referred to was marked General Counsel's Exhibit 2-D in evidence.)

* * *

Q. (By Mr. Moore) Were you working at the plant on Friday, the 25th of March? A. Friday, March 25th; Friday, the 25th of March was the day, as I recall, that the strike started.

Q. That is right. Were you working there, did you report to work? A. I reported there.

Q. When you reported there what were the names of the men who were there at that time, when you came to work? A. DeTrillo, Casillo, Addeo, Stephan, Massina, and myself, of course, and Mr. Tursi, and the foreman, Frank Ruiz, and Gene, who works in the office, so far as I know. There may have been someone else there. And possibly Falciano, although I don't recall about that.

Mr. Eltman: Excuse me: the only part of that answer to which I will object and move that it be stricken is the

designation "foreman," pertaining to Frank Ruiz.

Trial Examiner: Strike the word "foreman."

Q. (By Mr. Moore) Will you tell us what happened that morning, beginning with the time you arrived— A. When I arrived I saw Mr. Cody there, and the, Mr. Cody. I arrived at the same time Mr. Tursi arrived, and Mr. Cody went over and talked to Mr. Tursi. In the meantime I believe it was Mr. DeTrillo who told me "We are trying to get the union in today."

So—

Q. I want you to tell us only what you heard and saw, and if you said anything, tell us, or if anybody else said anything, tell us what they said, and who they were. A. And then I heard Mr. Tursi tell Mr. Cody that if the—

Mr. Eltman: Excuse me, I am going to object to the relation of any conversation he may have overheard between Mr. Cody and Mr. Tursi unless it can be shown he was a part of that conversation.

Trial Examiner: Where were you standing with reference to Messrs. Cody and Tursi when they were talking?

The Witness: About five foot away.

Q. (By Mr. Moore) Were others standing around there? A. The other truck drivers,—Frank Ruiz—we were all more or less in a group.

Q. Did you hear—

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Trial Examiner: I overrule it. Go ahead.

Q. (By Mr. Moore) Did you hear Mr. Cody speak to Mr. Tursi, and did you hear Mr. Tursi's answer? A. I heard Mr. Cody speak to Mr. Tursi.

Q. Tell us what you heard, and— A. Although I don't recall what I overheard, I heard them talking, but possibly I didn't hear what they said, although I heard them talking.

Q. You heard their voices? A. Yes, Mr. Tursi was in the car, and Mr. Cody was at the window of the car, so naturally they were speaking fairly close together.

Q. So while you heard their voices, they were audible, you didn't hear the distinct words; is that it? A. That is right, sir.

Q. Can you tell us anything that you heard them say? A. Mr. Tursi got out of his automobile and asked if it would be all right if he talked to us in the office, without Mr. Cody being present. And Mr. Cody said it was all right.

Q. Then what happened? A. We all went into the

office, and Mr. Tursi said he didn't think it was right that we do this to him.

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Q. (By Mr. Moore) From the time you arrived there until the group went into the office how much time elapsed? A. Five minutes, at the most.

Q. And you arrived at the same time Mr. Tursi did?

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A. I did.

Q. That was about seven o'clock, you stated? A. Seven, yes.

Q. When you went into the office tell us exactly who went in? A. Mr. Tursi, myself, DeTrillo, Massina, Casillo, Addeo, and Stephan, and I believe Frank Ruiz, although that I wouldn't say for sure. To my recollection he did, although the only ones I know for a fact are the ones I mentioned.

Q. Will you tell us who was in the office at the time you went in? All of these people you named, they went in, was there anybody else in the office? A. The bookkeeper, Sam Vogel, and a salesman—I just knew him by the name of Woody.

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Q. (By Mr. Moore) Was this in the sales office, where there is merchandise for sale, or what? A. In the sales office.

Q. Are there any other offices there? A. Well, there is a partition for the bookkeeper, and where the safes and records are kept.

Q. How big is the office where you all were? A. I'd say approximately the size of this room.

Trial Examiner: I would estimate it at about somewhat less than 25 by 15 feet, but very close to that.

Mr. Elton: I will accept your Honor's approximation of the size of this room.

Mr. Moore: Surely, that is acceptable.

Q. (By Mr. Moore) When you went into the office who spoke first? A. Frank Tursi.

Q. Will you tell us what he said, and what any of the men there said back to him?

Trial Examiner: Excuse me.

The Witness: Yes, sir?

Trial Examiner: When you give us the words of one of the men, tell us which man.

The Witness: Tursi said, "I didn't think you would, I

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didn't think you would do this to me," or words to that effect, as far as I can recall.

And I believe Al DeTrillo said that we "We want less hours."

Q. (By Mr. Moore) Did he say anything about how many hours you all were working? A. Al DeTrillo or Mr. Tursi?

Q. Either one of them. A. Not at that time.

Q. Tell us what was said now. A. Mr. Tursi asked each one of us individually if we were going to go out on strike, and everyone said yes, if we couldn't come to some terms.

Mr. Tursi then said if we didn't go on strike and didn't join the union, he would give everyone $5 a week raise.

Then Al DeTrillo said, "Well, if you give everyone $5 a week raise, that would only give me $85 a week, and others

will be making more, even ones who are here not as long as myself."

So Mr. Tursi then said, "Instead of that, if you don't join the union I will give everyone $90 a week." So he said, "Suppose you think that over and I will go out of the office, and you can decide what you want to do."

Q. Did he leave the office at that time? A. Mr. Tursi left the office, and we talked it over as—

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Q. When you were talking it over was Frank Ruiz there at the time? A. No; he was not.

Q. Was anybody else in there with the group of men talking it over? A. No, sir.

Q. Tell us what happened? A. Then we all said no, we would not accept it; Mr. Tursi then came back and asked us, and we said no. I don't know whether I said no or Al DeTrillo, but whoever it was said, "We will not accept it."

Mr. Tursi then said, "What is it you want?

Al DeTrillo said, "It isn't so much the pay, it is the long hours." He said, "60 hours a week," he said, "is quite a long time, and we do not have too much time to spend home with our families."

So Mr. Tursi then said he will give everyone a half a day off a week, and so I believe it was myself who said, "If I work half a day I have to travel for three hours to get here, and it would take me * * *" three hours round trip—" * * * and it would take me an hour and a half to get home, so by the time I work half a day the day will be pretty well over by the time I get home."

So he then said, "I'll give everyone a full day off a week." The days would be staggered through the week, that

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everyone would work Saturday, being that is the busiest day.

He then went out of the office again, and we decided that we wouldn't accept that.

He came back in, and we told him no again. He then said, "Well, you give us the—" —pardon me, Al DeTrillo then said, "With my pay after withholding tax, and the hospitalization is out," he says, "I do not have too much money left," he says, "and I find it pretty hard to get along."

Mr. Tursi then says, "Well, I will give everyone a day off, $90 a week, and I will pay all hospitalization for all of you, if you do not join the union."

He went out of the office again and we decided no again. And we then, when he came back, we told him.

"Well," he says, "there is nothing I can do because I don't want the union."

And as far as I know, that is when we went out of the office.

Q. When you went out of the office what did you do next? A. We told Mr. Cody that we did not accept any of his offers, as he would not accept the union. We then put on our placards and picketed Mr. Tursi's business.

Q. Just before you left Mr. Tursi's office did you say anything to him about going on strike?

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A. We told Mr. Tursi that—I don't recall who it was that told him—that when we walked out, we told him, "Well, if you can't take the union then we will just have to go on strike."

He said that, "I have done everything I could, but I just can't have a union."

Q. Did you picket the lumber yard that day? A. Yes, sir.

Q. How long were you there that day? A. I was there all day, except for possibly a half-hour when I went to eat lunch, and in another 15 or 20 minutes in the morning when I went for coffee.

Q. Did you carry a placard at all? A. I did.

Q. Will you tell us which men did carry placards? A. We all carried placards. DeTrillo, Casillo, Massina, Addeo, Stephan, myself.

Q. Did you speak to Mr. Tursi or did he speak to you at any time during that day after you left his office? A. He did.

Q. Will you tell us what was said and where it was, and who was there, if anybody? A. Mr. Tursi came out of his office quite a few times and spoke to quite a few of us.

* * *

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Q. (By Mr. Moore) How long were you in Mr. Tursi's office that morning? A. About an hour

Q. When you came out you immediately started picketing? A. We did.

Q. When was the first time when you came out of his office that you spoke to him or he spoke to you? A. I'd say about a half-hour after we started picketing.

Q. Where did he speak to you? A. As I was walking up and down in front of his establishment Mr. Tursi came out and told me that—

Q. Now, was anybody else there at the time that he spoke to you, anybody else who joined in the conversation? A. Not that I recall.

Q. Tell us what Mr. Tursi said? A. Mr. Tursi came out and asked me if I was trying to put him out of business.

I told him no, that I wanted to work for

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him. He then said that he, his father, didn't believe in unions and he doesn't, and that it is against his religion to have a union.

And as far as I know, that is all he said to me at that time.

Q. Did he speak to you any other time during that day on the picket line, that you recall? A. That day, I believe he did, although I don't recall what was said.

Q. Did he on any subsequent days speak to you? A. Yes.

Q. Will you tell us when, when after the picketing started? A. Approximately a week later he came out and Addeo and I were picketing at the time—he came out and told, asked us if we had enough money for Easter. We told him that we were managing, and he said, "Well, I hate to see anyone without money." He said, "I have a freight car on the tracks which I want to get unloaded, and if you and Addeo will unload this freight car for me, I will pay you $50, $25 apiece."

We refused.

Q. Addeo was present during that conversation; is that right? A. Addeo was present.

Q. Were any other pickets there in front of the establishment at that time?

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A. I do not recall.

Q. How many of you generally picketed? A. The first day—most of us were picketing all day, except for the time that we went to lunch or stopped to have a cup of coffee, although we all did not leave at once. I believe three of us went at one time, and three at another.

Q. The first day how many of you picketed, usually? A. Then we picketed, I believe, with one hour on and one hour off, three at a time.

Q. Did you at any time during the first day of picketing see Mr. Tursi speak to any of the pickets? A. Yes.

Q. Did you overhear anything that was said? A. I don't recall what I overheard. At this time I can't say what I overheard.

Q. Did you on any subsequent day following the day the picketing started see him speaking to any other pickets, other than the occasion he spoke to you and Mr. Addeo, if you recall? A. Well, Mr. Tursi spoke to us quite often, although I can't recall to others, the other fellows, although he did talk to them but I don't recall what was said, I only recall what he had talked to me about.

* * *

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Q. You have testified concerning your own duties during the month of March; now, during that month were there any employees working in the yard on a part-time basis, to your knowledge? A. Yes.

Q. Who were they? A. One was Grant.

Mr. Eltman: The first name or the last name?

The Witness: Well, it may be first or last.

Mr. Moore: There is a Grant Kreinberg on this piece of paper. Were there any others?

The Witness: And Norman.

Trial Examiner: Do you know Norman's last name?

The Witness: There are two Normans; there were two Normans there. Now, the Norman that I refer to worked on Saturdays and holidays, now and then.

Trial Examiner: Were both of them part-time employees?

The Witness: Well, the one Norman was there more often. When I first came to work there he was a steady employee as a salesman in the office. Then he was let go, or he left, and then he came back quite a few times, but he would leave every now and then.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

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There are two individuals with the first name of Norman; the last name of one is Haff; does that refresh your recollection?

The Witness: That seems to me that it was Haff who worked on Saturdays along with Grant.

Trial Examiner: The other individual whose first name is Norman has the last name of Vogeney.

Now, you were asked to name part-time employees. Go ahead.

The Witness: And the other Norman possibly—I don't know whether he was considered as—because he, he was, he worked erratically, so I don't know what his status was.

Q. (By Mr. Moore) You think that it was Norman Haff that went in the yard? A. On Saturdays.

Q. On Saturdays and holidays? A. Yes.

Q. Tell us what he did. A. Haff and Grant were in the yard, and their duties were to wait on cash and carry customers who came into the yard to get material.

Q. Did you finish. A. Just a little more. And then they, they also loaded trucks—they sometimes—

Q. Loaded lumber on trucks in the yard?

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A. Yes.

Q. Did they ever unload freight cars? A. No.

Q. Not to your knowledge? A. No.

Q. When you say that they waited on customers, will you tell us what you mean by that? A. They, the customers, would come into the—

Trial Examiner: Excuse me, he has already covered this, he has talked about persons who waited on cash and carry customers on Saturday.

Mr. Moore: But there is a distinction there, sir.

Trial Examiner: Is there?

Mr. Moore: Yes.

Trial Examiner: I am sorry, I missed it.

The Witness: They would go into the office, the sales office, and have an order made out for material, and pay the cashier for the material, and then, went into the yard with the copy of the ticket, and Norman and Gram were there as their main job, to take care of those customers.

Q. (By Mr. Moore) In other words, they would take the copies of the orders filled out in the office and fill the order, and give the material to the customer? A. That is right.

Q. They did not write out such orders, did they?

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A. No, they did not.

Q. They received no cash themselves from the customers? A. Well, they might receive a tip.

Q. But in payment for the goods? A. No.

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Q. (By Mr. Moore) Whom did you consider to be your supervisors at Sunrise Lumber Company? A. On March 25th?

Q. During March. A. Frank Ruiz and Mr. Tursi.

Q. Mr. Ruiz, you have testified, gave orders to you and to the other drivers? A. He did.

Q. Did anybody else give orders to you? A. Mr. Tursi.

Q. Anybody else? A. No.

* * *

Q. (By Mr. Moore) Mr. Honer, you have testified concerning Mr. Tursi speaking to you the day the strike started, when he spoke to you on the picket line? A. Yes.

Q. And another occasion when he spoke to you and Mr. Cody? A. Yes, sir.

Q. Did you continue picketing for some time after the strike

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started? A. I did.

Q. When, to your recollection, did you stop picketing? A. About the last week of April.

Q. You yourself stopped? A. Yes.

Q. Were there any other occasions when you were on the picket line when Mr. Tursi spoke to you, that you recall? A. Yes, sir.

Q. Will you tell us when in addition to the one concerning you and Mr. Addeo? A. Well, about the next week after the strike started Mr. Tursi came out and asked me how I am doing. I told him all right.

So I believe he said, "Nice day," or if it was a bad day he said, "It is a bad day"—I don't recall which.

And then he said, "Do you want to see me die?"

So I said, "No."

So he said, "Well, the only way a union will be in here is if I am dead, so do you want to see me die?"

I said, "No, I want to come to work for you."

So that was as far as that conversation went.

Q. Any other conversations between you and him? A. It was then about the second or third week of the strike he came out and he said, why don't I go down and see my

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brother, that he should be able to get me a job, and I told him that, no, I wouldn't do that.

And he said—did you say something, sir?

Q. No, that was noise in the next room. He thought you spoke to him. A. He then said that if I would buy a small truck, he would arrange that I could install the fences that are made and sold at his place. I declined that.

Then either in that week or the next week, which would be the third or fourth week, Mr. Tursi came out and told me that he had clipped advertisements out of the newspaper from the help wanted column for positions that are open, and if I wanted them, I could have them as—he said I shouldn't have trouble getting a job some other place.

And in that same week, I believe it was, he told me that they were looking for truck drivers at Elar Lumber therein, I believe, Lindenhurst, Long Island.

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CROSS EXAMINATION:

Q. (By Mr. Eltman)

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Q. Incidentally, when you refer to the office, you don't mean an office where books are kept, do you; you mean

that part of the establishment where merchandise is sold; is that

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correct? A. Where the orders are made out for the merchandise that is to be sold.

Q. Is that separate and apart from the area of Sunrise where customers congregate for the purpose of making a purchase? A. That is where.

Q. So that what you refer to as an office, is one general room where customers would come in, where merchandise other than lumber is kept, and where employees, some employees, are stationed; is that correct? A. Yes.

Q. What part of your day was spent in that area? A. In the office?

Q. As you have described it, the office? A. As what I described the office?

Q. Yes. A. I'd say the—none, unless I was called in there for some reason to—or that I was bringing tickets back, at least orders for delivery, to bring them back to the bookkeeper with the cash or checks which I collected for the merchandise that I delivered.

Q. What were some of the reasons that you would be called into this area? A. Possibly to—Mr. Tursi might say, or Gene, who was

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behind the counter, that to bring up some storm windows for a person that was in the office who wanted to buy them.

Q. Who else besides you would from time to time bring up storm windows? A. Any of the other truck drivers or the yard man.

Q. How about people whom you have described as salesmen? A. No, the ones I described as salesmen, they spent most of their time in the office, and only on rare occasions

would they come out, possibly to give someone a six-foot piece of moulding, or something of that minor nature, where it didn't involve any laborious work.

Q. Or skilled carpentry work? A. Or any type of work more than just picking out a small item to give it to the customer.

Q. Did you on occasion pick out lumber and do work of a minor nature? A. Did I?

Q. Yes. A. Oh, yes.

Q. Addeo? A. Yes.

Q. Incidentally, while we are talking about Addeo, do you know whether it is a fact that Addeo does not have a driver's license presently? A. That is what I understood.

Q. Do you know whether in the month of March he had a driver's license? A. As far as I know he did not.

Q. Who else among those employees who were involved in the strike would handle lumber, just as you have indicated you did? A. The other drivers, and the yard man.

Q. Were there any other parts of the establishment where you worked? A. Possibly down at the rear of the yard, when I was called up to make fences.

Q. Did you ever make a ping pong table? A. I believe we did make a few of them.

Q. When you say we, whom do you refer to? A. They might assign any of us to do that.

Q. Us, whom do you mean; can you name some names? A. Any of the drivers, or the yard man.

Q. That would include Mr. DeTrillo? A. It would include all the drivers.

Q. Mr. Massina? A. Yes.

Q. Mr. Stephan? A. Yes.

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Q. Coming back to the first part of your answer, you said there were always trucks moving; you don't mean to imply, do you, that the men, that all six of you were always out driving? A. No, I say that we were all not on the road constantly, due to the fact that freight cars had to be unloaded and the yard had to be maintained, and there were times when they might send a helper on a truck because of such a bulky nature that it would necessitate sending two men with one truck, and this other—

Trial Examiner: I think you have answered it.

Q. Which helpers do you refer to? A. Well, ordinarily that might be Addeo, due to his having no license, although there were times when I have gone as helper on a truck and left my truck in the yard, because of the bulky nature of the material.

Q. Have you seen Massina operate power saws and cross-cut saws? A. Yes.

Q. Have you seen DeTrillo operate those? A. Yes.

Q. Stephan? A. Yes.

Q. Have you seen them fill orders? A. You mean from the—

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Q. From stock. A. When a person comes out into the yard?

Q. Yes.

They would get the slip? A. From the—

Q. Customer. A. From the customer.

Q. And pull out the lumber called for by the slip; is that right? A. Yes.

Q. Addeo has done that, too, hasn't he? A. That is right.

Q. Have you ever taken care of customers in that area known as the office? A. In the office?

Q. Yes. A. No.

Q. Have you seen Addeo do that? A. When I first started to work with Sunrise Lumber Addeo was in the office most of the time, but approximately three months after he came out of what I call the office and was in the yard, without being in the office, making the order slips out.

Q. You said that when you made fences for the company Mr. Ruiz assigned you to that work?

A. That is right.

Q. Do you know who else he assigned to do work around the yard? A. He assigned all the drivers, truck drivers, and the yard man.

Q. Who else? A. And the part-time workers.

Q. Those were part-time workers you have described? A. Grant and Norman.

Q. He would tell them what to do?

Trial Examiner: Excuse me. Norman Haff?

The Witness: Yes.

Trial Examiner: Now, would you ask your question, please?

Mr. Eltman: Yes.

Q. (By Mr. Eltman) Did he assign Norman Haff to work? A. Yes.

Q. How about Grant Kreiberg? A. Yes.

Q. How about Leonard Kuntz? A. He is the one called what?

Q. Buddy. A. He did not have too much contact with him, that he was in the sales office.

Q. How about Mr. Vogeney, Norman Vogoney? A. Norman was in the office, he did not have much contact

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with him, but if Norman was out in the yard which he was on occasions, then he was under the supervision of Mr. Ruiz.

Q. What type of work would he be doing out there? A. It depended up to Mr. Ruiz.

Q. Can you tell us some of the work he did? A. Wait on customers, usually.

Q. Fill orders? A. Yes.

Q. Did he ever stack lumber? A. I don't believe I ever saw him stack lumber.

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RE-DIRECT EXAMINATION:

Q. (By Mr. Moore) When you say that some of the drivers or all of them would be assigned to make ping pong tables, do you mean to assemble them? A. To assemble them.

Q. Where were they milled, the parts, if they were milled or sawed? A. They, they were the—the legs were cut and the parts were all there, and possibly on a rainy day if they—or if the orders were not of such a nature that it required all the truck drivers to go out, they, Mr. Ruiz might tell someone, "Go down and make a couple of ping pong tables, assemble them." And then in the middle of making one you would be called out to, to take your truck.

Q. Where was this assembly work done? A. In the rear of the yard there was an open space, off to the side of the mill shop.

Q. It was not done in the mill shop itself? A. It is more or less like an alcove room, you would say.

Q. Were the parts milled in the mill shop, or do you know?

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A. They, the table tops, came in cut to size from the manufacturer, and the legs would, would usually be cut down at the mill.

Q. During March were there any occasions when you and the other drivers to your knowledge were assigned to the assembling of ping pong tables? A. Yes, although I can't recall just how much, although it would happen infrequently that you might be called on to do that.

* * *

Trial Examiner: Do you know the approximate monthly sales of ping pong tables?

The Witness: No, I do not, sir.

Trial Examiner: I just wanted to know whether we were spending time on something that represents a minor item in the

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business, or something that represents a larger item.

Mr. Eltman: Oh, I'd be willing to guess that the sale of ping pong tables was a minor item, but I don't think that is the point we are making. I think it is obvious that the point we are making here, and that what we will eventually argue, is that these people were well rounded employees who were assigned to do many things in the plant besides drive a truck, and it would make no difference whether we sold a hundred dollars worth of ping pong tables or a thousand dollars worth of fences. These employees were available for that, to work in it, to work in the so-called sales room.

Trial Examiner: You had no interruption on your cross-examination on that point. I was interrupting the General Counsel.

Mr. Eltman: I am sorry.

Trial Examiner: Go ahead, Mr. Moore.

Q. (By Mr. Moore) Can you approximate the amount of time you spent, say, during the month of March, assembling ping pong tables, and also in February? A. I'd say possibly, at the most, two days a month, although I don't know whether two days a month is right, it seems to me it was about that.

Q. That is about what it was? A. Yes, sir.

Q. According to your best recollection?

A. Yes, sir.

Q. Do you know how much was spent by other drivers on that item? A. Well, I don't believe they spent any more time.

Mr. Eltman: I object to the answer, and ask that it be stricken.

Trial Examiner: I don't think he would know, based upon his testimony.

Q. (By Mr. Moore) You stated that sometimes you went out as a helper on the truck? A. Yes, sir.

Q. Did you ever have someone go out as a helper for you on your truck? A. Yes, sir.

Q. Who? A. Massina, I recall once or twice, and Addeo, once it was Massina and Casillo.

Q. When you went out as a helper was the driver always one of these drivers whose names you have given us as one of the five drivers? A. Yes, sir.

Q. It would be one of the five drivers? A. Yes, sir.

Q. Do you know of any instances when any employees

other than one of these five drivers was assigned to work as a

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helper? Do you understand the question? A. Yes. No, only the five, and one yard man.

Q. Who would be Addeo? A. Who would be Addeo.

Q. Do you recall when it was or about when if was that Addeo was transferred from the office to the yard? A. I would say it was in the winter time, and it seems to me it was possibly December or January.

Q. You testified on cross-examination that Norman Vogeney, if in the yard, was under the direction of Frank Ruiz? A. Yes, sir.

Q. Am I to understand that sometimes he was working in the office and sometimes in the yard; is that correct? A. Yes, sir.

Q. Was that true during March? A. Yes, sir.

Q. When he was in the yard Frank Ruiz would assign his work to him? A. Yes, sir.

Q. Did he work any particular days of the week; do you recall? A. Very erratic, sir.

Q. How often was he in the yard, if you know? A. Well, he worked very erratically, in that sometimes he would be there for a week, and then he would be gone for a week, and then he would be there for a month, and then

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he would be gone for a couple of weeks, and then one time I—he went to work for another company, for a sash and door company—I don't know which you might call it—but he was very erratic in his attendance.

RE-CROSS-EXAMINATION:

Q. (By Mr. Eltman) Mr. Honer, in the assembly of a ping pong table, what tools would you use? A. Screwdriver and a hammer.

Q. You have testified, of course, that you have used a power saw? A. I didn't need a power saw to make a ping pong table.

Q. Forgetting about the ping pong table, in addition to the work involved in assembling ping pong tables, what other tools did you use about the place? A. Who?

Q. Yes. A. Myself?

Q. Yes. A. The power saw and the scintilla saw.

Q. Did you ever use chisels for any of the work you did? A. No, the—not after I left the mill. You are referring, naturally, to March?

Q. Yes, to March, February or December or January.

A. Yes, right.

Q. Any other tools you might have used from time to time? A. No. Hammer, scintilla saw, and power saw.

* * *

Trial Examiner: Will you describe for us this scintilla saw?

The Witness: It might be called a portable jigsaw. It is a portable saw with a single blade which—

Trial Examiner: A portable jigsaw?

The Witness: Yes.

* * *

ALEXANDER PETRILLO, a witness called by and in behalf of the General Counsel, having been first duly sworn, was examined and testified as follows:

Direct Examination:

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Q. (By Mr. Moore) You formerly worked for Sunrise Lumber? A. Yes, sir.

Q. When did you go to work there? A. About, a little over three years ago.

Q. Who hired you? A. Frank Tursi.

Q. (By Mr. Moore) When he hired you, what was your job, to what work were you assigned? A. As a driver on a lumber truck.

Q. When you left Mr. Tursi's employment, what job were you doing? A. Driving.

Q. Had you been driving a truck throughout your employment? A. Yes, sir.

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Q. Who were your supervisors, if any, there at Sunrise Lumber? A. Frank Tursi and the foreman. The first foreman was Vinny Abellino, I believe it is. And then Frank Ruiz.

Q. In March of this year who was your foreman? A. Frank Ruiz.

Mr. Eltman: Again, as I have before, I am going to object, and move the answer be stricken, on the ground it calls for a conclusion.

Trial Examiner: Strike it.

Ask the witness instead his working relationship with Ruiz.

Q. (By Mr. Moore) Who ordered you to do work, to perform certain duties? A. Mr. Ruiz.

Q. Did anybody else? A. No.

Q. Will you tell us what he would tell you to do in March of this year? A. Well, we'd report to work at seven o'clock in the morning, and then he'd have the tickets routed out, like all Massepequa, or all Seaford, or in a straight line. He'd given them to the driver, and he'd say, "You load this truck."

Or for a long while we were all assigned to a certain truck, and he'd give us the tickets and tell us to load the

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truck, and if it was a big load he'd grab Addeo or somebody in the yard and, "load this."

Q. What were your regular hours of work? A. 7 to 5:30. Half hour for lunch.

Q. Did you ever work later than 5:30? A. Yes, sir.

Q. Who would tell you to do so? A. Frank Ruiz.

Q. Anybody else? A. Well, whoever was in his position.

Q. I mean would anybody else ever tell you to work overtime? A. No, sir, most generally it was him.

Trial Examiner: Well, he asked you if anyone else—

The Witness: No, sir.

* * *

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Q. Will you tell us how much of your time was spent in driving a truck? A. About 95 per cent.

Q. What type of truck did you drive? A. Stake body, Dodge.

Q. What size truck? A. 14-foot body on it. I don't know what size.

Q. Was it a ton and a half, two tons? A. Two and a half ton, I think.

Q. Did you ever drive any smaller truck? A. Yes, sir.

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Q. What was it? A. The stake—the rack-bodied Ford pickup. Well, for that matter, the Chevy truck, which was a smaller truck and—whichever truck we were told to drive.

Q. Do you have any special licenses as the operator of a truck? A. Just the regular chauffeur's license.

Q. That is different from a license required to drive a passenger automobile, isn't it? A. Yes, sir.

Q. It is required by the state, is it not, in order to drive trucks? A. Yes.

Q. Now, you spent about 95 per cent of your time driving trucks? A. That is right, sir.

Q. Did you perform any other duties there besides driving trucks? A. Yes, sir, on rainy days we used to straighten up the sheds or do work that would keep us under cover, when it was slow on orders, and there was freight cars in; we used to unload freight cars or stack lumber.

Q. What other equipment did Mr. Tursi have for handling lumber, other than trucks? A. Well, the Hi-lift.

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Q. Did you ever operate it? A. I think I only operated it once, when they were very rushed, to load my own truck; that was all.

Q. Who generally operated the Hi-lift? A. Ruiz or Addeo.

Q. Did any of the other drivers to your knowledge operate it? A. Messina did.

Q. Messina? A. Yes.

Q. As a regular thing who operated it? A. Ruiz or Addeo.

Q. Was there a power saw there in the yard? A. Yes, two of them.

Q. Did you ever operate either of them? A. Yes, sir.

Q. What kind of saws were they; what were they used for? A. They were Dewalt circular saws for—

Q. Well, you could rip or you could cross-cut; is that it? A. Cross-cut, you could rabbit it out, do anything with them, set it on an angle.

Mr. Eltman: What?

The Witness: Rabbit out fence posts, or point the interposts so that they were diamond-shaped.

Q. Did you ever operate any of those saws?

A. Yes, sir.

Q. Doing what job? A. Making fence posts.

Q. They are located in the yard, aren't they? A. They are in the shed in the yard.

Q. Where is the mill with respect to the yard, where is it located? A. The south end.

Q. Of the yard? A. Yes, sir.

Q. These saws are not in the mill, are they? A. One is in the mill and one is in the shed, on the east side of the yard.

Q. Which saw is in the mill? A. Well, they are both the same, they are both Dewalt.

Q. Did you ever operate the Dewalt saw in the mill? A. Yes, that is the one I was operating on fence posts. That was only once.

Q. Once. When was that? A. It was on a rainy day when there was no work out, when we couldn't work out, or didn't take anything out in the rain.

Q. Was that this year or last year, or when was it, if you recall? A. I don't recall offhand.

Q. Did you ever wait on customers?

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A. Yes, sir. If I was in the yard and my truck wasn't on the road—if I wasn't on the road and if I was in the yard loading the truck at all, we were told that the customer comes first, wait on the customer.

Q. By wait on the customer, what do you mean? A. Well, they'd come out of the office with a cash and carry ticket, a charge ticket, whichever the case may be, and they'd hand us the ticket, and we'd pull the lumber out of the bins and tie it on their car or their truck.

Q. You never filled out orders yourself, did you? That is, write out the orders on order sheets? A. My own.

Trial Examiner: For customers?

The Witness: No, sir.

Q. (By Mr. Moore) Were the other drivers, or did they, say, during March, 1955, work on fence posts—to your knowledge? A. It is hard to say. I don't know if I was in the yard when they did.

Q. You were driving a truck most of the time? A. Yes, sir.

Q. So you can't say whether they did or did not; is that it? A. No, sir, the only one I know is Bill.

Q. Bill? A. Bill Honer.

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Q. John Honer? A. Yes, John Honer.

Q. How much did you earn? A. $80 a week.

Q. Were you paid on an hourly basis? A. Only after 5:30 at night.

Q. No, I will ask it this way; how much per hour did

you receive? A. My pay was $80 a week, and time and a half after 5:30, how they broke it down I don't know.

Q. You reported to work at 7 a.m.? A. Yes, sir.

Q. You had 30 minutes for lunch? A. Yes, sir.

Q. You stopped at 5:30? A. That is right.

Trial Examiner: How long on Saturdays?

The Witness: Same thing.

Q. (By Mr. Moore) Six days a week was what you worked, wasn't it? A. Yes, sir.

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Q. Did you ever assemble ping pong tables? A. Yes.

Q. When was that? A. On rainy days when we wouldn't go on the road.

Q. Did that happen very often? A. I don't know how often it rained. Whenever it rained instead of putting the material on the trucks, and delivering

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it so it would get wet, we'd stay in and do the work in the yard, in the mill, like under the sheds. We'd straighten up the lumber.

Q. How often would you work, how much of your time would you estimate you spent in assembling ping pong tables? A. I don't think I assembled more than three or four, tops.

Q. During the three years you were there? A. That is right, sir.

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Q. (By Mr. Moore) What are the names of the employees that you know sometimes assemble ping pong tables? A. Messina, Addeo, Honer, Stephan, myself,

Q. Casillo? A. Casillo is the other guy, the mill man, whose name was brought up before, the new guy—I didn't know him too well.

Mr. Winograd: Lehman.

Q. Walter Lehman? A. Yes.

Q. Did you ever have any employee help you on a truck as a helper? A. Yes, sir.

Q. On a number of occasions, or how often? A. Whenever we had anything that was too heavy to be handled by one man, and there was no help on the receiving end of the job.

Q. Who, if you recall, helped you? A. Well, I know in one case Stephan went out with me. Addeo went out a few times. Whoever happened to be available in the yard. If there was another driver in the yard at that time and his truck wasn't loaded, he'd go out as a helper with

another driver.

Q. Did anybody other than drivers or Addeo go to help you? A. I don't believe I understand what you mean, sir. Do you mean, by the office?

Q. Yes, did anybody from the office or did anybody—you have four drivers other than yourself and Addeo, whom you called the yard man? A. Yes.

Q. Did anybody other than those four and Addeo ever help you on a truck to go out and make deliveries? A. No, sir.

Q. Did you ever unload lumber from the freight cars? A. Yes, sir.

Q. Who generally did that work? A. Most of the time it was Addeo, and if it happened to be the stevedores around they worked in the car, and Addeo stayed in the yard.

Q. What do you mean by stevedores? A. That was a group of fellows, they used to do nothing but just unload freight cars, and they used to take one of our trucks, unload the freight cars on the track, take the lumber into the yard, and then stack it.

Mr. Moore: Their names don't appear on this paper.

Mr. Eltman: They are not our employees, nor have they been our employees.

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Q. (By Mr. Moore) You signed an authorization card to give to Mr. Cody, did you not? A. Yes, sir.

Q. Do you recall the date of that?

A. That was Friday, that was on a Friday night in the Massapequa Diner.

Q. Did you go to work the following Monday morning? A. Yes, sir.

Q. You worked the Saturday also after the night you met in the Massapequa Diner? A. Yes, sir.

Q. Were you present in the yard on any occasions when Mr. Cody came there and spoke to Mr. Tursi? A. No, I wasn't. Only that Friday morning.

Q. You met in the Massapequa, you said, Friday? A. Yes, sir.

Q. You worked the next day, Saturday? A. Yes, sir.

Q. Did you see Mr. Cody come that day to the yard? A. No.

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Q. When did you first see Mr. Cody there and speak to Mr. Tursi? A. The morning we went on strike.

Q. What day was that, if you recall? A. That was Friday, the 25th.

Q. March 25th? A. Yes, sir.

Q. What time did you report to work that morning? A. I usually got there about quarter to seven, 10 minutes of seven, so I can read my paper.

Q. On that particular morning when you reported to work, what employees were there? A. You mean at seven o'clock?

Q. Yes, that is right. A. Messina, Addeo, Stephan, Honer, myself, Faleiano, sir.

Q. Was Casillo? A. Casillo, yes; there was a salesman named—we used to call him Woody.

Q. Was he with the group of drivers and the other yard man? A. Casillo and Addeo?

Q. They were there, were they not? A. Yes, sir.

Q. But the salesman you started to name, was he there with the group?

A. No, sir, he was in the office.

Q. Were you there when Mr. Tursi arrived, or was Mr. Tursi there when you came? A. No, sir, I was there before Mr. Tursi arrived.

Q. Were you there before Mr. Cody arrived? A. I don't remember if I got there right before or after him.

Q. Just what happened now, what you heard, if anything, and who it was that said it. A. Mr. Tursi pulls into the parking lot on the east side of the building, and Mr. Cody walked over to his car.

Q. And how far away from you was Cody at that time, with Mr. Tursi, sitting in his car? A. About five or six feet.

Q. Did you hear anything that was said? A. No, sir,

I know they were talking, but I didn't hear anything that was said, outside—

Q. Yes? A. Outside of the fact that I heard Mr. Cody say that the fellows wanted the union.

Q. That is all you heard? A. That is all that I could make out.

Q. What happened next? Tell us what happened next and what was said. A. Well, then, Mr. Tursi got out of the car and he asked Mr.

Cody if he had been meeting us, and Mr. Cody said yes.

And then he asked, he said his religion didn't believe in the union, and that he'd sell his trucks and hire and rent trucks before he'd bring the union in.

Then he asked Mr. Cody if it was all right if he could have a meeting with us fellows. Mr. Cody said yes, and then we went inside.

Q. Who went inside? A. Messina, Addeo, Stephan, Honer, myself, Ruiz, Falciano, Mr. Tursi.

Q. You went into the office there? A. Yes, sir.

Q. Tell us what happened there. A. When we got in there Mr. Tursi wanted to know what we were doing this to him for.

Q. Now, when he started to speak to you were all of these men present that you mentioned; was Falciano there? A. No, Falciano, I don't know if Falciano stayed there right at that moment, or he had gone back to the mill. I couldn't say whether he was there for the whole period or not.

Q. Did you all have to punch a clock? A. No, sir.

Q. But he went in there at the time you all went in together? A. Yes, sir, because before that he couldn't get in before Mr. Tursi opened the door, to get back in the mill.

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At the very beginning, yes, when we went into the little office by ourselves and discuss among ourselves whether we wanted to stay in the union or take Mr. Tursi's offer; then Mr. Tursi and Ruiz went outside.

Q. Tell us what Mr. Tursi said to you, and what you and the other men answered, and tell us if you can identify the speaker. A. Mr. Tursi wanted to know what we were going to gain when we got into the union. So we started to tell him about the benefits we'd get from it, and we wouldn't be working 60 hours a week straight time.

And he asked to see a copy of the contract that we were going to get if we were going into the union, and that is why one of the fellows went out and got it.

He brought it back in. He looked at it. We all read it. And he said, well, he give us a $5 raise if we'd forget the union.

And then we found that Stephan and I were the lowest paid ones there, we were only getting $80, and the rest were getting $85, and Addeo was getting $75. And then he made a statement that he would give us all $90, with a half a day off during the week, which brought us down to 55 hours, and I am positive he went as high as $90 and 50 hours, a day off during the middle of the week. But it wouldn't be a Saturday.

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Q. Are you saying now that he offered you a half day off at one point? A. At one point, yes, and a $5 raise.

Q. Yes? A. Then to George and I—George Stephan and myself, it would have been a $10 raise. The other fellows would have gotten only a $5 raise, to $90. It would have been a $10 raise to Stephan and I.

Q. So that he changed the $5 over to— A. $90 salary for everybody.

Q. And if I understand your testimony correctly, he changed the half a day off over to a full day; is that correct? A. Yes, sir, not to be on a Saturday.

Q. Did any of you drivers or Addeo say anything to Mr. Tursi? Tell us everything that happened. You have told us what Mr. Tursi was saying. A. Well, we couldn't agree on the thing right there amongst ourselves at that moment, so we had a meeting of ourselves.

Mr. Tursi and Ruiz left the office and went outside, and we went into a little back corner, and we were going to have a ballot vote. But I believe it was George Stephan —I am almost positive—I am positive it was George Stephan then said, "As long as we have gone this far with the union, let's stick to it a hundred per cent."

And we didn't write the ballots, we voted orally, to stay

with the union 100 per cent.

Q. Then what happened? A. Then we came out and notified Mr. Tursi of our intentions of staying with the union 100 per cent. Then we put on the signs and started marching.

Trial Examiner: Who told you that?

The Witness: Mr. Tursi. He said to put on the—

Mr. Eltman: Excuse me one second. Could I have that last answer read back, please?

(Last answer read.)

Trial Examiner: I want the record to be clear. How did you hear it? We will do it this way.

The Witness: Shall I say it again?

Trial Examiner: You used the expression, "put on the signs and start marching."

The Witness: That is right.

Trial Examiner: Did you say that at that point you employees put on the signs and started marching, or did you say that someone told you to put on the signs and start marching?

The Witness: No, after we told Mr. Tursi that we were going to stick with the union 100 per cent, he just goes like this (indicating), and he says, "Put on the signs and start marching."

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Q. (By Mr. Mooye) Who among you employees—you and Addeo—there in the office that morning told Tursi that you were going to stick to the union 100 per cent; do you recall who said that? A. I said that, for one.

Q. Anybody else, or did you do the talking on that occasion? A. No, Messina was more or less supposed to be the spokesman.

Q. You told Mr. Tursi that, you do recall yourself?

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A. I know I said it.

Q. Now, what happened when Mr. Tursi said that to you? A. We went outside, and Mr. Cody was outside, and he had the signs, and we just put them on and started walking up and down.

Q. Who were we? A. Messina, Addeo, Honer, Casillo, Stephan, and myself.

Trial Examiner: Excuse me: I will ask counsel for the respondent if there is any dispute that the six individuals engaged in picketing beginning on the day fixed in the testimony?

Mr. Eltman: I think not. And I think we are prepared to concede that, sir.

Trial Examiner: All right, then I believe we need have no more questions of the fact that they did engage in picketing.

Mr. Eltman: We will go along with that.

Q. (By Mr. Moore) Now, on the day that the strike started, did Mr. Tursi speak to you at all while you were on the picket line—on that particular day, or did he on any occasion speak to you? A. Well, he came out a few times—I don't know whether it was that particular day or not—and told us we were damned fools.

Q. Just a minute, you say he came out several times?

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A. Yes.

Q. Do you remember the first time he came out and spoke to you, do you remember about when it was—the strike started on March 25th? A. Yes; a few hours, or about an hour after the picket line started he come out with Ruiz, and Ruiz asked us why we didn't take his offer.

Q. Who was present at the time that Ruiz asked you that? A. Stephan.

Q. All of the men? A. All of the men on the line because we got together in a bunch, right by the model garage.

Q. Was Cody there at that time? A. Yes.

Q. What did Mr. Ruiz say? A. Frank Ruiz told us we were damned fools for not taking up Mr. Tursi's offers.

Q. Was Mr. Tursi there at that time? A. Yes, sir.

Q. What else was said, if anything? A. Mr. Tursi kept repeating that it was against his religion, and he'd sell his trucks and rent trucks before he'd let the union in.

Q. Did anyone of you six men answer that, did you say anything back to Mr. Tursi or Mr. Ruiz?

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A. What do you mean, sir?

Q. Did you say anything at all to him? What I want is the complete conversation. A. That was the complete conversation. We were on the line, and we said we were going to stay there until we were recognized by the union —in the union.

Q. You say that happened about an hour after the picketing started? A. Yes, an hour or so either way.

Q. Were there any subsequent occasions when Mr. Tursi spoke to you? A. No, he'd come out and say, jokingly say it was a nice day, out, or if it was a little chilly, ask us if we wanted a little coffee, and laugh.

Q. Do you recall whether he said anything else to you? A. Well, we more or less spoke, or hello—I mean, there was no animosity among any of us.

Q. That is all you recall? A. Yes.

Q. Did he ever tell you that you were scabs? A. He told us that we were the scabs after we were calling the other fellows scabs.

Q. What is that? A. He put on a new crew, and came out and told us he had hired fellows in our place, and we were through. And we told him

that the guys that were working were scabs. And he put up a sign right overhead where we were marching reading to the effect, "Our employees are satisfied, and are working," and we used to keep hollering "scabs," all the time about it.

Q. When did that happen with reference to when the strike started? A. About a week after, a week or so.

Trial Examiner: I don't think we need go into that.

Q. (By Mr. Moore) Now, did you ever do any work in the mill itself? A. Do you mean actual mill work?

Q. Yes. A. No, sir.

Q. Do you know who was in charge—

Mr. Eltman: Excuse me one second: I don't think that is in response to the question. The question was: Did you do any work in the mill, and the answer to the question said he did no mill work. Now, there is a difference.

The Witness: Did I work in the mill? Yes.

Trial Examiner: Just a minute. The witness is drawing a distinction, I think. He testified earlier that he operated a saw in the mill.

Mr. Eltman: That is right.

Trial Examiner: So he has worked in the mill. Now he is trying to draw a distinction between the operation of that

saw for the particular purpose and, on the other hand, doing mill work.

Mr. Eltman: Well, I am prepared to concede that he did no mill work as such. I don't claim he was a mill man.

Trial Examiner: All right.

The Witness: I worked in the mill on the fences.

Trial Examiner: All right, you have answered it.

Mr. Moore: You concede that he was not a mill hand; is that what you said, he did not do mill work?

Mr. Eltman: Well, in the general sense that we understand a mill man's duties to be, we are prepared to concede that this man was not put to work doing mill man's work.

• • •

CROSS EXAMINATION:

Q. (By Mr. Eltman) Mr. Petrillo, you indicated that on rainy days trucks didn't roll, is that correct? A. Not all of the trucks, the trucks with rough lumber went out, stuff that wouldn't be hurt by the weather.

Q. You also testified that you were assigned to do work other than driving trucks on rainy days?

A. Yes.

Q. Was that the only time you were assigned to do other work, when it rained? Do you understand the question? A. Do you mean by delivering orders?

Q. No, I will rephrase the question.

Were there days other than rainy days when you did not drive a truck because you had no orders to deliver? A. No, sir.

Q. Is it your testimony that except for rainy days you drove constantly? A. Well, when we were even driving down to the freight yard and back, do you mean that by driving?

Q. No, delivering orders to customers. A. No, sir. Sometimes we drove down to the freight yard and unloaded cars, and just drove back and forth between the freight car and the yard.

Q. You didn't mean to imply by your testimony that 95 per cent of your working time was taken up by driving orders to customers? A. Yes, sir, that was just about what I spent on the trucks. I very seldom was on the freight car.

* * *

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GEORGE STEPHAN, a witness called by and in behalf of the General Counsel, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination:

Q. (My Mr. Moore) You formerly worked for Sunrise Lumber? A. I did.

Q. When did you go to work? A. I believe it was in July of last year, June or July of last year.

Q. 1954? A. 1954.

Q. When you applied for employment there, to whom did you

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speak? A. Well, first I spoke to Frank Tursi, and I asked him about a job, and he wanted to know if I was capable, and I said I thought I was. He then sent me outside to speak to Frank Ruiz and ask him if he thought I was capable of the job. So I went out and spoke to him, and he sent me in and told Frank to put me on the payroll.

Q. When you spoke to Mr. Ruiz did he ask you any questions pertaining to your qualifications? A. Yes, he asked me what I did before, and I told him I had just left the gas company. I worked for them for almost seven years.

Q. Did you go back and tell Mr. Tursi what Mr. Ruiz told you? A. Yes, I did.

Q. Did he hire you? A. Yes, he did.

Q. When did you go to work? A. The next morning, the following morning.

Q. What was your starting rate of pay, if you remember? A. I started at $75 a week.

Q. In March of 1955, what were you earning? A. $80 a week.

Q. Who assigned work to you? A. Frank Ruiz.

Q. Tell us what would happen when he assigned work: what would

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he do? A. Well, you'd come in in the morning, and he'd have your tickets laid out for you, and tell you what truck to load. You usually had your own truck, you usually had the same truck, and he'd tell you what to put on the truck, and give you the tickets. Sometimes he'd assign a yard man to help you load it.

Q. Who was the yard man? A. Tony Addeo.

Q. Did he ever assign a helper to you? A. No. No, that was the only helper, was Tony Addeo, the yard man.

Q. Did Addeo ever go out on a truck to help you make a delivery? A. Not with any delivery, not of mine.

Q. Did anybody else ever help you with a delivery? A. No, sir.

Q. Did you ever help anybody? A. No, sir.

Q. At what place at the company would Mr. Ruiz assign work to you? A. Well, usually in the office, when you came in in the morning, or when you come back with the truck maybe he'd be waiting for you out in the yard, and he'd give you some more tickets.

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Q. How much of your time was spent driving a truck, deliveries, loading and unloading? A. Oh, I'd say almost 90 per cent of the time.

Q. Did you ever unload freight cars? A. Yes, I did.

Q. Are you including that in your estimate of 90 per cent? A. Yes, because freight cars, we didn't handle them too often. Maybe once or twice a month; three times a month.

Q. What size truck did you drive? A. I don't know offhand what the weight of the truck was.

Q. What make truck was it? A. My truck was a Chevy.

Q. You were required to have a chauffeur's license, were you not? A. I was.

Q. Did you ever perform any work besides driving the truck and making deliveries, loading and unloading? A. Just cleaning up around the yard, waiting on people once in a while when they came in.

Q. How much of your time was spent in cleaning up and waiting on people? A. Well, the other 10 per cent.

Mr. Eltman: I am sorry, I didn't hear that.

The Witness: I'd say about the other 10 per cent.

Q. (By Mr. Moore) Did you ever assemble any ping pong

tables? A. No, sir.

Q. Did you ever assemble any fences? A. No, sir.

Q. Did you ever saw any fence posts? A. No, sir.

Q. Did you ever operate any of these saws there? A. Yes, I did, in the front.

Q. Up in the front? A. Waiting on people, cut a few lengths of—

Q. Operating a cross-cut saw? A. That is right.

Q. Or a rip saw? A. Well, not a rip saw, no. I never ripped anything.

Q. Were you working on the morning that the strike occurred? A. No, we hadn't started to work as yet.

Q. But you reported to work? A. I reported to work, yes, sir.

Q. Prior to that time had you had any discussion with

Mr. Tursi about the union? A. Yes, he had asked me one night.

Q. When was that? A. The week previous. I came in around seven o'clock one night, 6:30, seven o'clock. I was on overtime, and he approached me.

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Q. Did you see Mr. Tursi? A. Yes, he came out to the truck real excited like, and he said, "What is this here about the union? Have you been speaking to a delegate?" And I says, "No, I haven't," because as of this time I hadn't spoken to any delegate.

Q. About what date was that? A. I knew there was some rumors going on about the union—

Mr. Eltman: Excuse me, I move that that latter portion be stricken.

Trial Examiner: Strike the words "I knew—", and subsequent words in the answer.

Now, you testified that this was during the week before the strike began?

The Witness: That is right, sir.

Trial Examiner: And counsel is asking you if you can fix a closer date; can you tell me the day or the approximate day of that week?

The Witness: I'd say around the 15th.

Q. (By Mr. Moore) Prior to your signing General Counsel's Exhibit 2-B? A. Yes, it was.

Q. I show the witness the exhibit. A. Yes.

Q. That is your signature?

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A. Yes, sir.

Q. And was anybody else present when Mr. Tursi spoke to you? A. Frank Ruiz came out with him.

Q. Where was he? A. He came out with him, out of the office.

Q. Were you in the cab of the truck? A. I was in the cab of the truck.

Q. They were both standing outside? A. That is right, sir.

Q. Have you told us now everything that was said at that time? A. At that time, yes. As I say, I didn't tell them anything else about the union, I just denied that I spoke to the delegate, because I hadn't.

Q. Did Mr. Tursi or Mr. Ruiz say anything at that time that you recall? A. No, Frank just said, "Well," he said, "I don't know where this is all coming in.".

Mr. Eltman: Excuse me, I think I could understand the witness a little better if you refrain from gesticulating, and give us a clear answer.

Trial Examiner: Tell us as well as you recall what Tursi said.

The Witness: Well, Mr. Tursi said, as well as I can

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recall, that he doesn't know where the delegate is getting all this information from, if he hasn't spoken to me. That was just about the gist of it.

Q. (By Mr. Moore) What did Mr. Ruiz say? A. Mr. Ruiz didn't say a thing.

Q. He said nothing? A. No.

Q. You reported to work on the morning that the strike began; is that correct? A. Yes.

Q. What time of day did you arrive there? A. Seven, well, about five of seven.

Q. That was on a Friday? A. That's right.

Q. Do you remember the date? A. Not offhand. I heard the other fellows mentioning the 25th, but I wouldn't swear to the 25th, as I actually don't know if that was the date. I know it was a Friday, Friday morning.

Q. When you reported to work, was there anybody there? A. Yes, the other fellows, the other drivers were standing around, Frank Ruiz. They usually didn't open the doors until seven o'clock.

Q. Who was there, name them? A. Well, Al Petrillo, Honor, Addeo, Messina—

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Q. Yourself? A. Myself and Casillo, and Frank Ruiz. And the delegate, John Cody, was there.

Q. He was there when you arrived? A. Yes.

Q. Was Mr. Tursi there when you came? A. No, he was not.

Q. Did he arrive shortly thereafter? A. He arrived just about seven o'clock.

Q. Tell us what you saw and what you heard, if anything? A. Well, when Mr. Tursi pulled up, as I recall, Mr. Cody walked over to him and wanted to know whether they could speak, and Mr. Tursi asked him, please, if he couldn't take the fellows inside before, before we spoke with the delegate—he wanted to speak to us alone. Mr. Cody gave his consent.

We all went inside and spoke to Mr. Tursi.

Do you want me to continue?

Q. Yes.

Now, tell us who was present on the inside, all of the drivers and Addeo? A. All of the drivers, and I don't recall whether Mr. Tursi sent Mr. Ruiz out, or whether he was standing there—I believe he was in on this conversation, too.

Q. Tell us what was said and who said it. A. Well, Mr. Turst wanted to know if we couldn't straighten

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this out with the union. He said he had always been dead against unions, and his father was against unions, and therefore he didn't want a union in there. And he said he was willing to speak terms with us.

So we inquired what he meant by terms. Well, he offered us a $5 raise, and overall $5 raise if we stayed. And we said that was ridiculous, because just that morning I found out that Casillo, the newest man there, he'd been working there only a couple of weeks, he was making more money than I was already, and I was pretty peeved about it. And I figured the $5—

Q. Just tell us what was said. A. Well, I figured the $5 increase wasn't enough for me, so—I believe there were two of us that talked up, Al Petrillo and myself, that if we only got a $5 increase, the other fellows would still be making more money than us.

So then he says, well, all right, he will give everybody an increase to $90, the fellows that were making $85, and he'd bring us up, too, including Addeo, who was only making $75.

So we still weren't agreeable to that—well, I spoke up and I says, "The main thing we want here is shorter hours." 60 hours wasn't giving me very much time with my family. In fact, I recall a few incidents where he called in a couple of boys even on Sunday to do some work for him.

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Trial Examiner: Just tell us about the conversation.

The Witness: Well, that was—

Q. (By Mr. Moore) You spoke up and said that 60 hours was too much? A. 60 hours was too much, and actually what I wanted was less hours, and I believe that is what the other boys were after, too.

Well, then he agreed to give us a half a day off, which would bring it down to 55 hours, and we still said no go.

And then he said 50 hours. So a few of the boys were this way (indicating), they were, "Well, gee, maybe we ought to go back," so I said, "Would you mind if we went into the other room and discussed this a little further?", because the boys didn't want to speak in front of Mr. Tursi. So we went in the other room, and we all agreed sticking by the union, because as I said to them—well, there was a few of us said—there was no reason why Frank Tursi if we stuck by him that day, there was no reason he couldn't lay us off the following day, because we had nobody to back us if we didn't go with the union.

So we went back out and told Frank we still wanted the union in. Then called in—

Q. Do you recall which particular employee told him that you still wanted the union, or did several of you speak? A. Frankly, I don't know now if it was myself or Al Petrillo,

why, because we were doing most of the talking—and for that reason we were called the instigators.

Q. Tell us what you said to Mr. Tursi and what he said to you. A. Well, we told him that we wanted the union in, that we had decided we definitely wanted the union, that with these increases that he offered us and the shorter hours, that we still figured the union was a better deal.

Q. Did he say anything to you in reply? A. He said he will never have a union in there, it was against his

religion, and that the only way they'd ever get a union in there if he died. He said that is the only way they will get a union in the shop.

Q. Did anything else happen, was anything else said? A. Well, he said "If that is the way you fellows feel about it we will close the discussion."

And he sent us out with Cody, and that is when we started picketing. Mr. Cody had the signs in his car.

Q. Before you left the office, have you told us everything you recall before you left the office? A. Well, everything that I had to say I told you.

Q. Everything you recall that Mr. Tursi said you have given us? A. Yes.

Q. Did he mention hospitalization insurance, to your

recollection? A. Yes, I am sorry, he did, yes.

Q. What did he say? A. He said he would pay that if we, you know, agreed to stay. That was another thing he promised us.

Trial Examiner: Keep your voice up, please.

The Witness: That was another thing he promised us, was the hospitalization.

Q. (By Mr. Moore) When you left his office, will you tell us what happened? A. Well, like I say, we went outside and we said to Mr. Cody that we all decided to stick by the union, and we wanted the union in there. That is when—

Q. You started picketing at that time? A. We started picketing right away.

Q. After the picketing started that particular day, did Mr. Cody speak to you yourself on the picket line? A. I don't recall if it was the same day or not.

Q. Did he on any occasion speak to you? A. Oh, yes.

Q. About when was it after the picketing started? A. It may have been the first or second day he came out and he wanted to know why I was doing it to him, or if I have any grudges against him; and I said, no, I have no grudges against him, I thought he was a nice person.

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Then he asked me if I wanted him to lose his business, and I said no, that wouldn't be any good to me. In fact, I'd like his business to grow, because I figured it would help me.

And another occasion there was a beautiful—

Q. Was anybody present when he spoke to you that time if you recall? A. Well, the other fellows were just passing by on the picket line. I wouldn't know.

Q. Did he speak to you on any other occasion? A. Yes, many a day.

Q. Tell us. A. Well, he'd come out, and Mr. Tursi would say, "well, it is a beautiful day; aren't you sorry you are not working?"

And I said, "Well, it is a beautiful day, and I am thankful; I'd have to be walking up and down here in the rain."

And on a couple of other occasions he mentioned it was against his religion, and he kept trying to impress us with this religion.

Mr. Eltman: Objection.

Trial Examiner: Strike out the words "he kept trying to impress us * * *" and subsequent words in the answer.

Q. (By Mr. Moore) You spent about 90 per cent of your time driving a truck, you stated?

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A. That is right.

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Mr. Eltman: Respondent is prepared to concede the following: based upon the understanding that when we talk in terms of a mill worker we mean a skilled man who does intricate mill work, this witness was not engaged as a mill worker, and did no work normally performed by a skilled mill worker.

Q. (By Mr. Moore) Will you tell us where you performed your duties, primarily? A. Almost all in the yard.

Q. Did you perform any inside any of the buildings? A. Maybe once or twice I swept the floor in the office.

Q. Anything else inside the office that you did? A. No, sir.

Q. Did you know an employee by the name of Norman Haff?

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A. I knew a Norman there, but he was just the fellow who worked there on Saturdays. I don't even know his last name.

Q. What did he do on Saturdays? A. Well, the first thing he did in the morning was come in and clean up the yard, clean up the yard, clean up around the saws, throw out all the excess materials that were stored there during the week. He threw that out. Later on in the day he waited on customers.

Q. Filled orders? A. Filled orders.

Q. Do you know whether or not he did anything else there? A. Not to my knowledge.

Q. Did he ever drive a truck, to your knowledge? A. No.

Q. Did he ever go out as a helper on a truck? A. No, sir.

Q. How about Grant Kreinberg? A. The same.

Q. He worked on Saturdays? A. He worked on Saturdays.

Q. And holidays; or do you know? A. Not that I recall, no.

Q. Did he perform the same duties as Norman, of whom you have spoken? A. That is right, yes.

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Q. He never went out on a truck to make deliveries, did he? A. No, sir.

Q. Never drove a truck? A. Not that I know of.

Q. Did he ever load a freight car? A. No, sir.

Q. Did he ever help you load a truck? A. No, sir.

Q. Did Norman ever help you load a truck? A. No.

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Q. Do you happen to know who worked in the mill?

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A. Yes, Al Falciano, and a new man that just started there maybe a month or so before this incident. I don't recall his name offhand, either.

Q. Was it Walter? A. Yes, it was Walter something or other.

Q. Lehman? A. I wouldn't know. We were never introduced to the new people.

Q. Did Walter ever help you on a truck? A. No, sir.

Q. Did he ever drive a truck, to your knowledge? A. No, sir.

Q. Did he ever do any loading or unloading? A. No, sir.

Q. Do you know what he did do? A. He just did mill work, worked on cabinets, maybe sink-tops, and items like that.

Q. Do you know what Faleiano did? A. Well, he did the same thing, he did mill work practically all the time. Once in a while I'd see him make out a ticket up in the office, maybe for one of his own items, or a cabinet, or something that he made for someone.

Q. Do you recall whether he did anything else? A. No, that is all I believe he ever did.

Q. Did you ever see him drive a truck?

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A. I did.

Q. When was that? A. I saw him one time go over and pick up a piece of formica. That was the only time I recall him driving.

Q. Did you ever see him unload a freight car? A. No, sir.

Q. Did you ever see him go out as a helper on a truck? A. No, sir.

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Stenographic Transcript of Testimony at Hearing of November 10, 1955.

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PROCEEDINGS

* * *

Trial Examiner: The hearing will come to order.

The General Counsel proposes to call Mr. Tursi as a witness. Prior thereto the record should show that the respondent contends that an appropriate unit is a plant-wide unit, exclusive of office and clerical employees.

According to the respondent the appropriate unit consists of the following employees: Ken Hobbie, Francis Ruiz, Tom Dunican, Eugene Durante, Al Faleiano, Arthur Messina, Anthony Addeo, George Stephan, Al Petrillo, John Hozer, Charles Hammer, Walter Lehman, S. Casillo, Cameron T. Witmer, all of whom, according to the respondent, were full-time employees at the times material; and the following employees: Norman Haff, Grant Kreinberg, Norman Vogeney, Leonard Kuntz, John Pehowdy, and Anellio Spampanatu, all of whom, according to the respondent, are part-time employees. The totals are 14 and 6 full-time and part-time employees, respectively, according to the respondent's contention.

There is one other point: the respondent's position is that Ruiz is a working foreman who is not a supervisor within the meaning of the Act?

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Mr. Eltman: That is correct.

Trial Examiner: Now you want to call Mr. Tursi?

Mr. Moore: Yes, sir.

Trial Examiner: Are you calling him under Rule 43B?

Mr. Moore: Yes, sir.

Trial Examiner: Come around.

FRANCIS TURSI, a witness called by and in behalf of the General Counsel, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination:

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Q. (By Mr. Moore) Mr. Tursi, as I ask you questions, if you wish to refer to this payroll ledger, say so, and I will hand it to you.

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Now, I have before me here the page for Francis Andrew Ruiz, and it shows that his total wages, beginning in January 4th up through March 29, 1955, were $115 per week. That is correct, isn't it, that is what the ledger shows?

Trial Examiner: Speak up.

A. That is what the ledger shows.

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Q. (By Mr. Moore) I have before me now the ledger sheet concerning Cameron T. Witmer, and it shows for the week ending March 1st that he was paid $50, and also the two weeks preceding that, $50; was he a part-time employee? A. March—

Q. February and March? A. February—

Q. I might for your consideration point out again that for the week ending March 8th he received no pay, and for the week ending March 15th he received $67, plus a few cents. A. Possibly—

Trial Examiner: What?

Q. That he was part-time? A. I can't remember that far back.

Trial Examiner: I think the record should show that this ledger sheet itself shows that Witmer did not work for the respondent in 1955 prior to the work week ending February 15; is that correct?

Mr. Eltman: That is correct.

Trial Examiner: Speak.

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The Witness: Yes.

* * *

Q. (By Mr. Moore) Did you say he was a part-time employee, or you just don't remember? A. I don't remember.

Q. I have before me the ledger sheet concerning Kenneth F. Hobbie, and it shows that for the week ending March 22nd he earned $50, and the week preceding that, which ended on March 15th, $50—I am looking at this at random, if you'd like to stand up and look at it—for the week ending February 1st, $375.93, and March 8th, $125.87. Can you tell us what that that employee did, what his earnings were and can you tell us the great variations of fluctuations in the amounts received? A. Mr. Ken Hobbie spends 10 per cent of his time selling.

Q. On the outside? A. Both. Inside.

Q. By outside, you mean going outside and soliciting customers? A. Either in the place or outside the place.

Trial Examiner: Louder.

The Witness: Either inside or outside. He does both.

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Now, Mr. Hobbie is not paid on a commission basis. The amount of money that Mr. Hobbie is to

receive is determined when this particular job that he contracted is finished.

Let me explain that. Let's say a customer comes into our place and wanted a garage built. Mr. Ken Hobbie would estimate it and try to get the order. That might take 15 minutes.

From then on it is entirely his responsibility, in the case of a garage in particular, No. 1, to get a permit; No. 2, to hire a concrete man to do the work; No. 3, to make up a material list for material to go on the job; No. 4, he hires carpenters to do this work.

The most important thing, it is impossible for Mr. Ken Hobbie to complete and do his duties properly unless he is allowed to come in the yard, load a truck and come out with materials, where he was short, or possibly it could be inadequate, in the middle of the job the woman says, "I want an attic closet." He can't wait two or three days of five hours, for somebody else to bring it there. So he just runs in, jumps in a truck, and loads it and takes it to the job.

And if I had a union shop, Mr. Hobbie would have to belong to the union; am I correct?

Mr. Moore: That is your position.

The Witness: Would he be able to use the truck?

Trial Examiner: We still, in so far as I can understand,

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do not have an explanation of the reason for compensation of several hundred dollars in a particular week. I think that was the question.

Mr. Moore: That is right.

The Witness: The reason for that is, the reason these boys are willing to, the reason Ken Hobbie is willing to pitch in and load the truck and help in the yard, if necessary, to expediate this job is because he is paid on a percentage of the profit that this particular job shows when it is done.

Trial Examiner: In other words, the weeks there when he received a relatively high compensation are weeks in which he worked on jobs of the sort that you mentioned, perhaps a garage door or an attic?

The Witness: He might have two or three jobs, you see, weeks before, and all of a sudden they finish in one week.

Trial Examiner: And he received a portion of the profits; is that your answer?

Speak up.

The Witness: Yes, sir.

But he cannot perform his duties unless he goes into the yard and loads trucks.

Mr. Moore: You answered the question.

Trial Examiner: The points you want to bring out, Mr. Tursi, will be brought out by your counsel when he questions you.

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The Witness: I am sorry.

Trial Examiner: Let me ask you this: Is Hobbie paid on any basis other than a percentage basis?

The Witness: Yes, I believe he gets $50 a week, and a percentage.

Q. (By Mr. Moore) So that actually it is a guarantee of a flat $50 per week, and then the percentage that you mentioned; is that correct? A. Yes, sir.

Q. Now, I have before me, the ledger sheet for Thomas A. Dunican, and it shows that for each week beginning with the week ending on January 4th and running through the week ending March 8th, 1955, he received $200 per week; and for each week thereafter, up until as far as the records—

Trial Examiner: Well, throughout the times material.

Q. Yes, sir. (Continuing) He received $300 per week. Now, can you tell us what Mr. Dunican did, for which he was paid these amounts? A. The same thing Mr. Hobbie did.

Q. In other words, he had a flat guarantee of a weekly salary of $200; is that right? A. Those are his drawings against his profits.

Q. Drawings against his profits? A. Yes, sir.

Q. So that this man also had a drawing account; is that it?

A. Yes, sir.

Q. And did he have a flat weekly guarantee? A. No, sir.

Q. So that he had a weekly salary, plus a percentage of profits, plus the advantages of a drawing account—that is correct? A. Not quite. He must earn money before he can get it. A drawing account means when you pay men out—

Trial Examiner: Well, let's do it this way: did Dunican have a salary, a guaranteed salary?

The Witness: Yes, sir.

Trial Examiner: How much was that?

The Witness: $50.

Trial Examiner: Then he was paid on the same basis as Hobbie, is that true?

The Witness: Yes, sir.

Q. (By Mr. Moore) I have here the ledger sheet of Eugene Duranty; it shows that for the week ending March 22nd, he was paid $110, and March 15th, $110; and for the weeks prior thereto $100 per week. Now, can you tell us what his duties were? A. Everything. No man is hired to do any specific job.

Q. Everything performed there on the premises of Sunrise Lumber and off the premises wherever necessary was also performed by Eugene Duranty?

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A. Yes, sir. I will go further, to say he is the most experienced lumber driver I have. The other men we all taught. This man was in the lumber business before I ever met him.

Q. The sheet shows that on March 8th, the week ending that date, he was paid $100, and the following week, ending on March 15th, $110, and for all periods relevant thereafter, $110; can you tell us what, if anything, happened to cause that variation? A. Yes, he wanted his wife to stay home. His wife was working nights. He said, "Frank, if you give me $10 a week raise, my wife can stay home, and I will be happier and everybody will be happier."

Trial Examiner: You gave him a raise?

The Witness: Yes, sir.

Q. (By Mr. Moore) His duties did not change; is that correct? A. No, sir.

Q. Will you tell us how his time was divided among his duties? A. It is very hard. You see, the record will show, as you probably know, the lumber business, the volume

drops in half in winter, yet my men all work steady. I mean the volume of the summer business is double, the men just move, and try to keep busy, they do whatever comes first, whatever must be done, and it could be anything.

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Q. Did he clean up the yard? A. Yes, sir.

Q. Would Mr. Dunican also clean up the yard? A. Yes, sir.

Q. And Mr. Hobbie? A. Yes, sir.

Q. Would they sweep the office? A. Yes, sir.

Q. Now, I have here the sheet for Alfonso Falciano; it shows that for the week ending March 22nd he was paid $145.87. A. Yes.

Q. And the week ending March 15th, $129.30; the week ending March 8th, $119.65. Can you tell us what his duties were? A. Everything: he worked in the yard, loaded trucks, unloaded trucks, delivered lumber, worked in the shop, waited on customers, sold customers, wrote up orders, estimated—a customer come in and said, "I want to put up a door; how do you do it?" He sat down and said, "Well, this is what you need; that is how you do it."

Q. Where would you say most of his time was spent? A. In the plant.

Q. The mill? A. No, sir.

Q. What do you mean by in the plant?

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A. Any place in the plant.

Q. By plant you mean not the office, apart from the office; is that it? A. No, I consider the office part of the plant. His time is any place, wherever there is work to be done.

Trial Examiner: Well, we have used the word plant, mill, yard. Now, the word yard would embrace the property on which your business is located; would that be true? Or is the yard separate from the office?

The Witness: No, it is all in one place and—

Trial Examiner: What does the plant consist of?

The Witness: The whole operation.

Trial Examiner: What does the mill consist of?

The Witness: A small room with a few saws.

Trial Examiner: What does the yard consist of?

The Witness: Well, I would say the yard is an open area where lumber is stored outside. Then we have sheds where lumber is stored inside. So it might be better to say plant—that covers everything.

Trial Examiner: All right, now, did Faleiano work throughout the plant?

The Witness: Yes, sir.

Q. (By Mr. Moore) He worked in the mill also; when you say he works throughout the plant you cover the mill? A. Yes, sir.

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Mr. Eltman: Are you going to a new employee?

Mr. Moore: I am not leaving this completely.

Mr. Eltman: When we leave Faleiano, may we go off the record?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Q. (By Mr. Moore) Is it your testimony that Faleiano also drives a truck? A. Yes, sir.

Q. And unloads freight cars? A. Yes, sir.

Q. Petrillo testified when you were here that he also unloaded trucks; is that correct? A. Yes.

Mr. Ehman: That he, Petrillo, also unloaded?

Q. Yes, unloaded trucks, freight cars, loaded trucks—all of that is correct, isn't it? A. Yes.

Q. Now, Petrillo, according to this ledger, earned for the week ending March 22, $84? A. Yes, sir.

Q. And for the week ending March 22nd Falciano earned $145.87; now, do you say that Falciano and Petrillo performed the same work?

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The Witness: May we go off the record a minute?

Trial Examiner: Wait a minute. Just ask him if the two individuals performed the same type of work in March, 1953 and for the earlier portion of 1955.

Q. (By Mr. Moore) Specifically for the week ending March 22nd, did these two individuals perform the same work that week? A. Yes, sir.

Q. Can you explain the difference in pay there? A. Yes, sir.

Q. Will you please do so? A. Well, one thing, I know Mr. Falciano works on Sunday, worked that Sunday, in between, the Sunday preceding that. In fact, if I remember, he worked with Messina.

Trial Examiner: Messina?

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A. I'll say this: many duties that Falciano can do, for instance, occasionally if a customer comes in and wants a cabinet built, Mr. Falciano can build it. You see, many

duties that Falciano performs can not be performed by Al Petrillo. But Mr. Falciano many times performs duties that are performed by Mr. Al Petrillo, so although they do the same work, I mean, they, Mr. Falciano does the same work as Mr. Petrillo, occasionally, when necessary, he can be called upon to do something requiring a little more skill.

Another point—I don't wish to disagree with Mr. Petrillo, although he stated yesterday he was with me three or four years, and although the record will show that he worked from the first right up until he quit that morning — I have to say that I consider Petrillo a part-time man. I mean, I don't

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have my records here, but in the three or four years Mr. Petrillo came and went as he liked, and worked for me when he had nothing better, and as soon as he found something better he worked. It was an agreement, I mean, whenever he needed work he came, and I gave him a job.

Q. Well, the sheet for Alexander Petrillo shows that he received not less than $80 each week, beginning with the week ending January 4th and running through March 22nd. And one week he received $86, and another week $84, not less than $80. Are you saying he was a part-time employee during this period?

Mr. Eltnian: I think the witness answered that. The witness said he is referring to periods before January 1st of this year.

Q. Is that correct? A. Yes.

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Q. This sheet, the sheet for Anselllo Spampanatu, shows that he did not work after March 15th until April

5th; now, will you tell us why that appears? A. We didn't need him.

Q. You didn't need him?

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A. No.

Q. So that he was not employed at the time during the week ending March 22, he was laid off; is that right?

Mr. Eltman: I am going to object to the use of the term "laid off" as not being a reflection of the witness' testimony.

Trial Examiner: I overrule it. If I understand the witness, I think it is a good term. You testified that Spampanato was not needed at that time; is that right?

The Witness: Yes, sir.

Trial Examiner: Is it correct to say he was laid off for the period of approximately two weeks, and then returned when he was needed?

The Witness: Yes, sir.

Q. (By Mr. Moore) The ledger sheet also shows he did not work during the week ending March 1st, nor during the week ending March 8th; is it your testimony that he was not needed during those periods? A. Yes, sir.

Trial Examiner: Well, before we leave him, let me see that sheet, please.

Mr. Moore: Yes, sir.

Trial Examiner: Will counsel agree that Spampanato—correction: I see that his name is spelled on the ledger sheet differently than on the paper from which I read his name into the record, and it appears on the ledger sheet as

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S-p-a-m-p-a-n-a-t-o. Now, I ask if counsel will agree

that that individual only worked one week during the month of January, 1955, according to the ledger sheet?

Mr. Eltman: Yes, we will so agree.

However, sir, may the record also show that during the month of February the named individual worked the week ending February 7th, on February the 15th—

Trial Examiner: Well, he worked during the four weeks in February?

Mr. Eltman: That is correct.

Q. (By Mr. Moore) Now, this sheet shows that he was paid $171.92 for the week ending February 14th; can you tell us what his duties were during that week that justified that amount of pay? A. I can't remember.

Q. Can you recall the basis for his pay; is it possible that he also received a percentage of his sales, or a percentage of the profit from some transaction? A. No, he worked in the yard, he worked in the yard.

Q. So that when he did work he worked in the yard? A. Yes, sir.

Q. Can you tell us what he did in the yard? A. I guess you'd call him a yard man, whatever had to be done.

Q. The same as Addeo, you say?

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A. He knows a little more than Addeo.

If I may say in answer to a question that was given before—

Trial Examiner: No, we will come back to that after we finish with this one. This question is: what was the work of Spampanato which resulted in his earning the amount for that particular week? You

said he was a yard man and that he knows more than Addeo, that would explain why he earned more than Addeo. And can you go further—.

The Witness: No, not on that, no, I was thinking of something else.

Trial Examiner: Did he do work that Addeo does not do?

The Witness: Yes, sir.

Q. (By Mr. Moore) What? A. It is hard to define it. That Addeo does not do, or does not want to do.

Trial Examiner: What?

The Witness: You say, does he do work that Addeo does not do, or doesn't want to do.

Trial Examiner: The question is whether he is qualified to do work that Addeo cannot do?

The Witness: Yes, sir.

Q. (By Mr. Moore) What is the work? A. He is able to do maintenance work.

Q. On certain equipment?

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A. On buildings.

Q. And did he do such work? A. Some of the time that he was there, sir.

Q. Will you please explain that? A. I don't know how to explain it.

Q. You have no explanation for it? A. No, sir.

Trial Examiner: Excuse me, I'd just like to interrupt you, Mr. Moore.

Mr. Moore: That is all right, go ahead.

Trial Examiner: But I am reluctant to come back to points that are in my mind after you gentlemen have finished. I think a question or two as we leave the subject makes for a better record.

Mr. Moore: I do, too.

Trial Examiner: Mr. Tursi, you said that Spampanato does building maintenance work?

The Witness: If something needs to be repaired, he can do it.

Trial Examiner: You mean around the plant?

The Witness: Yes, sir.

Trial Examiner: Or away from the plant, for a customer?

The Witness: No, in the plant, sir.

Q. (By Mr. Moore) Can you recall any instances when he has done such work during the period in question here?

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A. I can't remember.

Mr. Eltman: What is the period in question?

Mr. Moore: The ledger sheet shows that it begins in January, and we have asked questions up to March.

The Witness: I believe that he was digging a trench, he was digging a trench for me.

Trial Examiner: Keep your voice up, please.

The Witness: If I remember, now—

Q. (By Mr. Moore) Digging a trench there at the premises? A. Yes, sir.

Q. Would you say that he was digging the trench during the period in which he was paid $171.92? A. I can't say for sure.

Q. It is possible that he was, is that it? A. It is possible.

Mr. Moore: I plan to leave that particular employee, unless there are other questions.

Q. I have here the sheet for Charles Hammer. It shows that the first week for which he received pay in 1955

was the week ending March 1st, and for that period he earned $57.63. For the week ending March 22nd he earned $51.44. Now, can you tell us what his duties were? A. Same as Ken Hobbie.

Q. Will you tell us again what those were?

Trial Examiner: Well, I don't think he needs to recite

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that in detail. He told us before Hobbie's work and Hobbie's methods of compensation.

Mr. Moore: That is right.

Q. (By Mr. Moore) Are the methods of compensation for both Hobbie and Hammer the same? A. The methods are the same, but they are in two distinct fields.

Q. Will you tell us what you mean by that concerning Mr. Hammer? A. Well, he likes fences. He takes care of fences.

Q. What do you mean by that? A. Assigns the jobs, sees that they are done correctly, takes the lumber out on a truck so not to hold up his men. If we deliver 100 pieces of lumber to a job and the customer says, "I don't like ten," he will come down to the yard and put 10 pieces on the truck and take them up and change them.

Q. Does he have direct contact with the customer in such an instance as that? A. He speaks to the customer, of course.

Q. Does he take the customer's orders? A. Yes, sir.

Q. Does he calculate the amount of money to be charged for the material ordered by the customer? A. He is given a price list; yes, sir.

Q. Does he receive the cash from the customer?

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A. That is hard to say. He might take a $10 deposit; and

later the customer, a few weeks later the balance comes in. I don't know what you mean by cash.

Q. Well, when the order is placed by the customer and the customer pays any money, Hammer receives the money, does he not? A. Everybody receives money, same as the driver. Everybody collects money, yes, sir.

Q. At that point or where does Hammer receive the customer, in the office? A. Yes, sir.

Q. So that he does sell material? A. Yes, sir.

Q. What else does he do? A. He, he is in charge of the fences, he sells.

Q. To customers? A. Yes, sir.

Q. Does he go out and solicit customers for fences? A. No, sir.

Q. He waits until they come there; is that it? A. Yes, sir.

Q. Does he oversee the erection of those fences? A. Yes, sir.

Q. Who installs the fences? A. Fence installers.

Q. Who are they? A. You mean their names?

Q. Yes, sir. A. Gosh, I—I couldn't remember all their names.

Q. They are not here on this list, are they? A. No, but possibly they should be. We will have to discuss that.

Q. But they are not on this list at this time? A. No, sir.

Trial Examiner: When you say not on the list you mean not among the names that I read into the transcript?

Mr. Moore: That is correct.

Trial Examiner: In connection with the fence installers, let me ask this question: Mr. Tursi, in

talking about Hammer, you used the words "hold up his men." I think you were saying that Hammer was performing certain functions in order not to hold up his men. Do you remember what you said?

The Witness: Yes, sir.

Trial Examiner: What men were you talking about?

The Witness: The fence installers.

Trial Examiner: As I understand it, the fence installers are among your employees?

The Witness: Yes, I consider them employees.

Trial Examiner: Do you carry them in this ledger?

The Witness: No, sir.

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Trial Examiner: In any event they are not employees that the respondent contends belong in the unit?

Mr. Eltman: That is correct.

Q. (By Mr. Moore) Now, you compared the jobs of Hammer and Hobbie, and you said they were similar? A. Yes.

Q. You stated, you testified concerning the method of paying Hobbie; did Hammer receive payment on the same basis, that is, a guaranteed weekly salary, with a percentage? A. No, sir, he just gets—the fence season doesn't last all year, so maybe for one or two months of the year he is not with us; then he comes back in the spring. He is not paid a salary.

Trial Examiner: Is he paid a straight commission?

The Witness: No, sir.

Trial Examiner: Well, how is he paid?

The Witness: He is paid on the percentage of the outcome of the particular job he takes.

Q. (By Mr. Moore) What do you mean by outcome, the total amount of money received by Sunrise Lumber? A. No, sir.

Q. What do you mean? A. The total amount of profit.

Q. So it is a percentage of the profit of a transaction involving fences?

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A. Yes, sir.

Q. The ledger sheet shows that for the week ending April 26th he received $27.57. You would say then that that represents a percentage of the transactions involved during that week, not of the transactions, but of the profits on the transactions; is that correct? A. Yes, sir.

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Q. All right, sir, thank you.

John Pehowdy, now, you will notice here on this ledger sheet that he did not work at all during the first quarter of 1954; is that correct? A. Yes.

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Q. Can you tell us when he last worked in 1954; the ledger sheet shows July 13, 1954 was the last period for which he was paid. A. Yes, sir.

Trial Examiner: What was that, July of 1954?

Mr. Moore: July 13, 1954 was the last week he worked.

Mr. Eltman: As long as we are on that subject, may the record also show that for the year 1954 John Pehowdy worked regularly from the first week

in January up until July 13, 1954, with the exception of two weeks in May and two weeks in June.

The Witness: Might I explain that, Mr. Counsel?

Mr. Moore: One second.

Trial Examiner: When your counsel interrogates you, you will have an opportunity to explain these matters.

Q. (By Mr. Moore) The ledger sheet shows, does it not, that he worked for the first time during 1955 during the week ending April 19th? A. Yes, sir, that is correct.

Q. Now, this ledger sheet does not show anything else concerning his employment, does it, other than just the periods during which he worked, and the amount of pay and the withholding amounts? A. That is right.

Q. Beginning during the period ending April 26th, what were his

duties? A. Worked in the yard, waited on customers, loaded trucks, unloaded trucks, and incidentally, he is the only lumber man that we have there.

Trial Examiner: He is what?

The Witness: The only experienced lumber man that works for Sunrise Lumber.

Q. (By Mr. Moore) The ledger sheet shows that he was paid $125 per week? A. Yes, sir.

Q. Paid that there for about six weeks, and then he was paid $135; ending on June 6th; is that correct? A. It is in the book.

Q. Will you tell us what his duties were in order to receive $125 per week? A. What his duties?

Mr. Eltman: I think he has answered that.

The Witness: Anything.

Trial Examiner: He testified that this man did

various types of work. Are you trying to ask him whether there was any particular type of work he did which justified the higher rate of pay?

Mr. Moore: That is what I would ultimately get to. Perhaps he would answer that.

Trial Examiner: Suppose you ask him.

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Mr. Moore: All right.

The Witness: We are open two nights a week, and I forgot to mention in the case of Frank Ruiz and Mr. Faleiano and Mr. Pehowdy, they were hired with the understanding they would work two nights a week. As we mentioned before, being a country lumber yard, and since it takes people a long time to get home, many people can only shop at night. So we are open at night, and that is why these employees, certain employees, are paid extra, to work at night.

Q. (By Mr. Moore) Pehowdy was not working during March of this year, so the ledger sheet shows, and he was not an employee of yours during March of 1955, was he? A. Pehowdy is as much an employee of Sunrise as I am, sir.

Trial Examiner: Well, we already have an answer to the question. Let's have another question.

Mr. Moore: That is all.

That is all on the ledger. I do want to ask Mr. Tursi how many trucks he has at the shop.

The Witness: One.

Q. (By Mr. Moore) How many did you have in March this year? A. Six.

Q. Who maintains— A. Six, yes, sir.

Trial Examiner: Will you inquire as to the types

of

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trucks?

Mr. Moore: Yes, sir.

Q. (By Mr. Moore) I'd like for you to tell us the types of trucks. A. One is a one-ton Ford pickup, one is a one and one-half ton Chevrolet, one is a two-ton Ford Dodge—no, sorry, one is a two-ton Ford, and I believe that these three are Dodges.

Q. What size are the Dodges? A. Two tons, sir.

Q. Three two-ton Dodges.

Trial Examiner: I count five—you have a one—

The Witness: One—

Trial Examiner: Wait a minute. I will start again: you have one Ford, which is a one-ton pickup?

The Witness: Yes, sir.

Trial Examiner: You have one Chevrolet, which is a one and a half ton truck: is it a pickup?

The Witness: We call that a rack body.

Trial Examiner: Is that a stake body?

The Witness: Stake body, yes.

Trial Examiner: You have three Dodges, which are two-ton trucks?

The Witness: Stake body.

Trial Examiner: Now, that is five.

The Witness: And one Ford two-ton stake body.

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Q. Does anybody in your employ drive these trucks? A. Everybody.

Q. Except the office girls, of course?

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A. I had one that drove, too, yes, sir.

Q. All of these trucks are of such size that under the New York State Motor Vehicle Law a driver must have a chauffeur's license; isn't that correct? A. I don't think that is correct.

Q. In what respect is it not correct? A. I don't know what the law is, the actual law, but I don't think there are many fines for people driving trucks without chauffeurs' licenses.

Trial Examiner: I am afraid that is not an answer to the question.

Mr. Moore: No, sir. May I have the question read back.

Mr. Eltman: Well, this witness is not an expert on the law.

Trial Examiner: Well, I think he may be able to answer the question.

(Last question read.)

The Witness: I can't answer that question.

Trial Examiner: It is your understanding that the Motor Vehicle Law does not require a chauffeur's license for anyone who operates one or more of your trucks?

Mr. Eltman: If the Examiner please—I don't mean to interrupt your questioning—but I want to point out that that is not the important aspect of this case. The important aspect of this case is whether in fact these employees drove

trucks, and whether or not they had a license is immaterial, because this Board is not charged with the duties of determining whether this employer, or these employees, complied with the law concerning the necessity of having a license.

Trial Examiner: Yes, but I think this goes to credibility.

Mr. Eltman: All right.

Trial Examiner: Let's try it another way, because some moments have passed, and perhaps my question was not clear to you. Do you know whether the State Motor Vehicle Law requires a chauffeur's license for persons who operate your stake-bodied trucks. If you don't know, say so.

The Witness: I don't know.

Trial Examiner: The same would be true as to the smaller trucks?

The Witness: Yes, sir.

Q. (By Mr. Moore) You hired Mr. Honer, didn't you? A. Yes, sir.

Q. Didn't you ask him whether he had a chauffeur's license? A. Yes, sir.

Q. And he told you he did? A. Yes, sir.

Somebody else told me they did, but they didn't.

Q. Who was that? A. Mr. Addeo.

Q. You asked Mr. Addeo, didn't you? A. He was six weeks driving trucks before I—somebody told me.

Q. So that as a matter of fact you required at least Honer to have a chauffeur's license before you hired him; that is correct, isn't it? A. Well, that is to the experience I had with Addeo—

Q. Prior to hiring Addeo you also asked him if he had a chauffeur's license? A. No, I didn't.

Q. Then when did you learn that Addeo didn't have a chauffeur's license? A. It was five or six weeks after he was there.

Q. How did you learn that? A. Somebody told me.

Q. Who told you?

Mr. Eltman: I object. I think it would be putting this witness in an embarrassing position to reveal that Addeo did not have a license.

The Witness: I really don't remember.

Trial Examiner: I will let the answer stand.

Q. (By Mr. Moore) After you learned that Addeo did not have a license you stopped him from driving trucks, did you not? A. Yes, sir.

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Q. So that as a matter of fact you do know that a driver has to have a chauffeur's license; is that correct? A. I can't agree with you. There are many men driving trucks without chauffeur's licenses.

Trial Examiner: That is not the question, Mr. Tursi. The question is what the law requires. Not whether people drive trucks without licenses.

. . . .

CROSS EXAMINATION:

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Q. (By Mr. Eltman) Mr. Tursi, can you tell us by looking at this book when it was that you first employed Mr. Leonard Kuntz? A. February 8th.

Trial Examiner: 1955?

Mr. Eltman: That is correct. And I'd like the record to show that Mr. Kuntz worked from Febru- 8th, 1955 regularly every Saturday up until and including March 22, 1955.

Mr. Moore: And that he did not work after that.

Mr. Eltman: The payroll ledger does not indicate any employment after that period, but March

22nd, I point out, is beyond the date when Mr. Cody testified he first approached Mr. Tursi and discussed recognition of the union.

Trial Examiner: All right.

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Mr. Moore: That is a matter of argument.

Trial Examiner: Let me see, does your work week end on a Tuesday, Mr. Tursi?

The Witness: Well, this man was regularly employed on Saturdays only. What is those dates?

Trial Examiner: I asked you if your work week regularly ends on a Tuesday?

The Witness: Yes, sir.

Trial Examiner: The answer is yes?

The Witness: Yes.

Trial Examiner: Will counsel stipulate that Kuntz was employed only to work on Saturdays, at the rate of $15 per day, and that he worked on Saturdays in 1955 as follows: February 5th, February 12th, February 19th, and on Saturdays in March as follows—that is incorrect in this respect: the pay period ending March 1st, a Tuesday, and Kuntz was paid for an additional Saturday in February, that Saturday being February 26th.

And that he was paid for and worked on the following Saturdays in March: namely, March 5th, March 12th, March 19th, following which he has not worked for the respondent.

Do you so stipulate.

Mr. Eltman: I will so stipulate.

Mr. Moore: It is so stipulated.

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Trial Examiner: All right, you needn't argue that.

* * *

The Witness: He changed positions, and wasn't available on Saturdays any more.

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CROSS EXAMINATION (Continued):

Q. (By Mr. Eltman) * * *

Q. Do you know as a fact whether Mr. Kuntz was employed elsewhere during the week? A. Yes, sir.

Q. And he worked for you on Saturdays only? A. Yes, sir.

Q. And the one holiday in the first quarter of the year? A. Yes, sir.

Q. When did Mr. Vogeney start working for you, do you recall? A. This year?

Q. No, what was the first time Mr. Vogeney became employed by you? A. Four or five years ago.

Q. Did he ever work full-time for you? A. Yes, sir.

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Q. When? A. Most of the time he works full time.

Q. I am sorry, I had him confused with another. Is he a part-time worker now or a full-time worker?

Trial Examiner: Well, you contend he is a part-time.

Mr. Eltman: My original contention was that he is part-time, but as I look at this payroll ledger now I see he is pretty much of a full-time employee, Mr. Tursi.

Mr. Tursi: Yes, sir.

Mr. Moore: May the witness look at the ledger sheet.

Q. (By Mr. Eltman) Yes, will you look at the ledger sheet and tell us from this the rate of employment with you, or how steady an employee he has been? A. Well, he is a sick man. When he is well he works; when he is not well he doesn't work.

Q. When he is well does he work a full week? A. Yes, sir, when he is well he works a full week.

Trial Examiner: In order that the record will be clear I ask counsel if they agree that this ledger indicates that Vogeney worked three days or less in January, and no days in February, that he worked in each of four weeks in March, and during each of the work weeks in April, in each instance in March three or four days during each particular work week. That will conclude it.

Do you agree with that?

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Mr. Eltman: I think it is a fair reflection of the payroll ledger with respect to Mr. Vogeney.

Mr. Moore: I so agree.

Q. (By Mr. Eltman) What type of work did Mr. Vogeney do for you? A. Worked in the yard, waited on customers, loaded trucks, unloaded trucks, took deliveries out, cut lumber when necessary.

Q. When you say took deliveries out, what do you mean? A. He delivered orders around.

Q. Did he drive a truck when he did that? A. Yes, sir.

Q. Did you say he is still employed? A. No, not at the moment, he is doing work for his brother-in-law. He is putting up a big extension for him.

Q. (By Mr. Eltman) For the first time when did Mr. Pehowdy come to work for you? A. About four years ago.

Q. Here again, I advise both the Examiner and Mr. Moore that we contended Mr. Pehowdy was a part-time employee. Upon looking at this payroll record I see that Mr. Pehowdy is a

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full-time employee.

Mr. Moore: As of what date?

Mr. Eltman: We will come to that.

Q. (By Mr. Eltman) During the year 1954 it appears that Mr. Pehowdy worked full time from January 1st up until July 13th, sir. He did not work from July 13th until the end of the year 1954, he did not work in the first quarter of 1955, and began working in 1955 again in the week ending April 19, 1955.

Trial Examiner: Do counsel agree?

Mr. Moore: Yes, sir, I agree that that is the reflection of the record.

Mr. Winograd: Yes, sir.

Q. (By Mr. Eltman) Do you know whether Mr. Pehowdy's employment was fairly steady during the year 1953? A. Yes, sir.

Q. 1952? A. Yes, sir.

Q. What type of work does Mr. Pehowdy perform for you? A. Work in the yard.

He waits on customers, he loads trucks, unloads trucks, receives material, helps in the shop, and makes sales tickets.

Mr. Moore: Is that as of the present time?

The Witness: Yes, sir.

Q. (By Mr. Eltman) How about during the year 1954, would

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you say that was a fair statement of the work he did for you during that period? A. Yes, sir.

Q. And ever since he resumed his employment with you in 1955, would you say he has been doing just the work you described to me? A. Yes, sir.

Q. From on or about July 13th until the week preceding —July 13th, 1954, to the week preceding the week ending April 19, 1955—there is no employment shown for Mr. Pehowdy; do you know what he was doing during that period? A. He was in Connecticut; his mother has a big estate, and she is over 80, and she felt she was ready to pass away, so thank God she hasn't yet, and he had to go up there for those months to straighten out the affairs, and she put everything in his name.

Q. Prior to the time he left for Connecticut did he tell you he was leaving? A. We discussed it, and he told me he'd be back as soon as he could.

Q. Did you come to any understanding with him as to his right to come back to work? A. Absolutely.

Q. Was it understood between you that he could come back to work as soon as he was able?

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A. Absolutely. I think I mentioned before that John is 25 years in the business, and he happens to be the only man I can go to when I have a, when I want to try something new, or try something I haven't tried, and I am happy to see him, I am happy to have him. I miss him when he is not there.

Trial Examiner: What do you have in mind when you speak of trying something new?

The Witness: Well, I say, he is 25 years in the lumber business, and many times a salesman comes

in and tries to sell me something. In fact, I will give you an example of the time I didn't ask his advise, a salesman came in and said, "Why don't you buy a carton of this red wood", a certain grade. He said it would be good for business. I am a young man only in the lumber business a few years, and I tried it on the salesman's word, and I ended up burning $3,000 or $4,000 worth of lumber. It just happened to be one of those times John wasn't there. I mean, if he was there, he knew, I could have asked him and saved myself that money. That is all he has done all his life.

Q. (By Mr. Eltman) I want to discuss with you Francis Ruiz. How long has he been with you? A. Three, four years.

Q. What type of work does Mr. Ruiz do for you? A. He works in the yard.

Q. Doing what?

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A. Well, he is over, he is over the men, he is over the men in the yard, but actually I spend a lot of my time in the yard, too, and Frank spends all his time loading trucks and unloading trucks, and he works in the freight car when necessary, puts lumber away, receives lumber, counts lumber—anything that come along, he works at it.

Q. Does he operate any machines, such as a fork-lift? A. Yes, sir.

Q. How about the saws, does he ever operate the saws? A. Yes, sir.

Q. Does he give instructions to any of the men concerning the routing of their orders? A. Yes, sir.

Q. Does he hire men? A. No, sir.

Q. Beg pardon? A. No, sir.

Q. Do you ever discuss with him the hiring of certain individuals? A. Yes, sir.

Q. To what extent is that discussion carried on? A. I listen to his recommendations, and I make the final decision.

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RE-DIRECT EXAMINATION:

* * *

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Mr. Moore: Does respondent still contend that Vogeney is a part-time employee?

Mr. Eltman: No.

Mr. Moore: You say he was full time in March of this year?

Mr. Eltman: That is right.

Q. (By Mr. Moore) Was Vogeney working on other jobs during March of this year? A. No, sir. He is a sick man.

Q. Can you tell us what is wrong with him? A. I don't know.

Q. Is he physically incapacitated, crippled, or what would you say? A. Mr. Vogeney is a retired colonel in the United States Army. Norman is one of the most wonderful people that you ever met, but he drinks occasionally, and he is definitely a sick man.

Trial Examiner: I can't hear you.

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The Witness: I said he tends to drink occasionally, that is why I said he is a sick man. I feel for him, but he is definitely an employee of mine, has been for four or five years. And that is the reason

why it looks erratic, on there. And he might work six months, and then you wouldn't see him for a month, and that is the kind of man he is.

Q. (By Mr. Moore) Well, he sold lumber, didn't he, in the office, and other supplies, primarily? A. Years ago Norman was a—like I gave him more responsibility, but last year and this year I couldn't depend on him, so I had to use him in the yard as an extra man, whenever he came to work.

Q. Did he ever do any work in the office? A. Years ago.

Q. During March of this year? A. No, sir. That is because I work in the office, too, and I couldn't depend on him. I have all the burden on my shoulder, so I put him in the yard.

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Q. (By Mr. Moore) Will you look at the sheet concerning Arthur Messina again, and tell us when it was that he received additional compensation which represented a percentage of sales that he had made.

Trial Examiner: Sit down, please, sir, start your answer all over.

The Witness: I say I couldn't tell by looking at that.

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Q. (By Mr. Moore) That sheet does not show, does it? A. No, sir.

Trial Examiner: Let's see if we can get a somewhat better answer.

Did he ordinarily earn $85 a week?

The Witness: Yes, sir.

Trial Examiner: With the exception of the last work week of this year when he apparently worked

only one or two days, in all other work weeks earlier in 1955 the minimum figure set out on the ledger for him is $85; is that correct?

The Witness: Yes, sir.

Trial Examiner: Now, we have other figures of $86.07, $87.13, on up to $106.30. Would you say that in any instance when the pay was more than $85 for the work week he received that additional pay because of having brought in orders, or because of having worked more than 60 hours a week, one or the other?

The Witness: The way it appears to me, this $101; and $106—

Trial Examiner: $101 and $106.30.

The Witness: Yes, I distinctly remember this one of $106.30, he worked with Falciano on a Sunday. And there is reason to believe this was the same the week before.

Trial Examiner: The $101?

The Witness: Yes, sir. And I think the amount here, any

above the $85 was for commissions, because he was real active. We were training him.

Trial Examiner: Now I think I understand you. Let us see if this is correct: during the first quarter of 1955 there was only two instances when Messina earned as much or more than $100?

The Witness: Yes.

Trial Examiner: One of those instances is the work week ending March 15th where the figure is $101; and the second instance is the following work week, where the figure is $106.30?

The Witness: Yes, sir.

Trial Examiner: And you say that—

The Witness: To the best of my knowledge.

Trial Examiner: All right, it is your best recollection that his compensation went over $100 because he worked on some special projects on Sundays?

The Witness: Yes, sir.

Trial Examiner: Now, proceeding from March 15th back towards the first of the year, we find that there were three work weeks in which he earned exactly $85; and there are seven work weeks in which he earned above $85, but no more than $94.60.

And your testimony is that it was in those work weeks that he received commissions to supplement the $85?

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The Witness: To the best of my knowledge.

Q. (By Mr. Moore) Now, is there anything on this sheet which show that the $106.30 which he received was as a result of overtime work on a Sunday, such as you have mentioned?

Trial Examiner: Let's proceed along. The answer to that is no.

The Witness: No, sir.

Trial Examiner: The witness testified that was his best recollection.

Q. (By Mr. Moore) It is your recollection. Now, the difference between his base rate, which was $85—that is correct, isn't it, $85? A. Yes.

Q. And $106.30 would be $21.30. Now, is it correct to conclude that that is overtime pay for Sunday, the difference between $85 and $106.30? A. I am not a bookkeeper.

Q. What was the answer? A. I say I am not a bookkeeper, sir, I couldn't answer that question.

Q. You cannot say that was overtime pay or not? A. I don't calculate those things.

Q. Well, Messina did receive overtime when he worked on Sunday; did he not?

A. Yes, sir.

Q. Honer did also; didn't he? A. Anybody that worked, yes, sir.

Q. Anybody, any employee there? A. Yes, sir.

Q. Can you name some who did, other than the two I have named?

Trial Examiner: Need we go into that? As I understand it, anybody who—except perhaps for those who earned only percentages or commissions—all others, if they worked on Sunday, they received pay for it; is that right?

The Witness: Yes, sir.

Mr. Moore: That is all.

Trial Examiner: Back to you.

Mr. Eltman: I have no further questions.

Mr. Moore: I do want to say that based upon his answer here concerning Norman Haff and Grant Kreinberg, that they do spend five days of their time off each week on other jobs, it is the position of the General Counsel that they should be excluded. I apologize for reversing myself.

Trial Examiner: That is all right. You would exclude everyone but the eight persons already named as persons whom you would include?

Mr. Moore: It doesn't come to eight, no, sir. It is the five drivers that I have named, plus Addeo, the yard man.

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RE-CROSS EXAMINATION:

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Q. (By Mr. Eltman) What are Witmer's duties?

Trial Examiner: No, no, what were his duties as of the first quarter of this year?

Q. I will amend my question as suggested by the Examiner.

What were Witmer's duties during the first quarter of the year? A. Well, the same as Ken Hobbie's, if you want to make it short. Do you want me to go through it?

Trial Examiner: No, that is enough.

Mr. Eltman: Are you through with Ken Hobbie?

Trial Examiner: I am, yes.

Mr. Eltman: For the purposes of keeping the record in some order let me ask one question concerning Hobbie.

Q. When you say he spent 90 per cent of his time getting his work done, what was he doing? A. He was supervising the work, he was delivering material to the work, he was cleaning up the jobs with the trucks—which is a very important point I don't think I brought out. As each man finishes these jobs, they have to go out and clean it up, and they grab a truck and go out, because they want to get paid, and they don't get paid until they clean it up.

Q. Did Hobbie drive a truck?

A. Yes, sir.

Q. Did he deliver materials to the job?

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A. Yes, sir.

Q. Did he ever do any work, did he ever fabricate any of the materials? A. I don't believe so.

Q. Did he ever pull lumber? A. Yes, sir.

RE-DIRECT EXAMINATION:

Q. (By Mr. Moore) Did each person who sold lumber and other materials from your yard make his own deliveries? A. Not all of them, no, sir.

Q. Who sold the material which was delivered by Messina, Casillo, Honer, Stephan? A. We did in the office.

Q. Who? A. Myself and whoever was helping me. The boys took turns.

Q. Who would that be? A. Sometimes Frank would be in there for a few hours, and sometimes Gene, and—

Trial Examiner: No, no, call them by their last names.

The Witness: Duranty, sometimes Faleiano, and sometimes Vogeney, and sometimes Pchowdy. The only steady man in the office is myself. The rest come in when I need help.

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Mr. Moore: Now at this time the General Counsel has a stipulation to offer, which it is believed Mr. Eltman will join in, and Mr. Winograd. It is that on June 10, 1955, a letter was sent by Samuel J. Cohen, attorney for Local 282 of the charging party herein, to Sunrise Lumber & Trim Corp., and that this letter was received by respondent, and was answered by Mr. Eltman under date of June 19, 1955; further, as a part of that stipulation, that on June 21; Mr. Cohen again wrote to Sunrise Lumber & Trim and mailed the letter to it, and that it was received by the respondent, that on June 22nd Mr.

him, and Mr. Eltman called Mr. Cohen on or about that date, and was unable to reach him, that there were several calls by Mr.

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Cohen to Mr. Eltman, and that they never did reach each other over the telephone, and that no other correspondence was written by either party to the other.

Mr. Eltman: There are two additions to that stipulation I would like to make. May I see those letters, please?

The first is that on or about July 1, 1955, Mr. Cohen went on vacation for a month, and was not in his office during the month of July, nor was he attending to his work.

Mr. Moore: I can't say "nor was he attending to his work."

He was on vacation during the month of July.

Mr. Eltman: All right.

Trial Examiner: Just a moment. I want this stipulation to be clear. We have a stipulation offered by the General Counsel. The respondent is now in the process of modifying it, and in that process the General Counsel wants to modify the respondent's modification. Do you, Mr. Eltman, accept the last modification mentioned by Mr. Moore, namely, do you stipulate that Mr. Cohen was on vacation, but that is as far as he will go with respect to your proposed modification of his stipulation.

Mr. Eltman: Yes, let me make this modification: that during the month of July Mr. Cohen never called me.

Mr. Moore: That is acceptable.

Trial Examiner: All right, then the point is that Mr.

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Cohen was on vacation and did not call Mr. Eltman during July 1955.

Mr. Moore: That is right.

Mr. Eltman: The second modification to the stipulation is the following: That if Mr. Eltman were to take the witness stand and testify—and the purpose of the stipulation is to obviate the necessity of testimony by both Mr. Cohen and Mr. Eltman, who are both lawyers—he would testify that while several days elapsed between the receipt of the letter from Mr. Cohen dated June 10th, and Mr. Eltman's letter to Mr. Cohen dated June 19th, that there was less than nine days intervening between the receipt of Mr. Cohen's letter and the transmission of Mr. Eltman's letter. And let me explain what I mean—

Trial Examiner: I think I know what you mean: there is less than nine days between your receipt of it personally, as distinguished from the respondent's receipt.

Mr. Eltman: No, I mean receipt of it by respondent. That this date of June 10th does not necessarily carry with it the conclusion that it was received by Mr. Tursi for Sunrise Lumber Company on June 11th, which would be the normal period for the delivery of mail.

Trial Examiner: Well, I don't think that that is particularly material.

Mr. Eltman: Oh, yes, it is material, for this reason:

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apparently my letter of June 19th crossed Mr. Cohen's letter of June 21st. By June 21st Mr. Cohen either had not received my letter, or my letter was not called to his attention, because he wrote—

Trial Examiner: I understand.

Mr. Eltman: (Continuing) A letter, calling attention to his letter of June 10th.

Mr. Moore: Well, we cannot stipulate to something we don't know.

Trial Examiner: That is an inference that one might draw from the letters themselves. Now, let's see what our stipulation is.

Mr. Eltman: Incidentally, June 10th is a Friday.

Mr. Moore: There is no contention that a lapse of nine days has any great significance. We don't so contend. The letter would have taken four or five days, and quite often does here in the city.

Mr. Eltman: All right.

Trial Examiner: Let's see, is this the stipulation: first as recited by Mr. Moore: second, with the modification offered by Mr. Eltman with respect to Mr. Cohen's being on vacation, and third, with the modification offered by Mr. Eltman that a period of nine days did not elapse between the receipt of Mr. Cohen's letter of June 10th and the response from Mr. Eltman of June 19th: is that your

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stipulation?

Mr. Eltman: That was the stipulation.

Mr. Moore: Yes.

Trial Examiner: And from that stipulation the respondent would request that the inference be drawn that the letters of June 10th and 19th—correction—June 19th and June 21st crossed in the mails?

Mr. Eltman: That is correct.

Trial Examiner: The reporter will mark for identification—

Mr. Moore: I cannot stipulate that they crossed in the mail.

Trial Examiner: I didn't ask you to. I think my statement is clear.

Mr. Moore: I think it is, too.

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Trial Examiner: The hearing will come to order.

The parties stipulate that on March 24, 1955, in case No. 2-RC-7393 the union filed with the Second Regional Office of the Board a petition naming as employer the respondent, and describing the unit as "Chauffeurs and Yardman, excluding foremen and millworkers," and reciting that the number of employees in the unit was five. On June 10, 1955, the union filed with the Regional Office a request to withdraw the petition, which request was approved by an order of the Regional Director on June 14, 1955.

Mr. Eltman: I would like to add to that stipulation that on April 5, 1955, a joint conference on the petition was had before the Examiner Mr. Pravitz, and at that conference the parties were unable to agree on the appropriateness of the unit, and did not sign a stipulation for a consent election, and

that subsequent to that conference the Board duly scheduled a representation hearing for April 27, 1955, which hearing was postponed from time to time until the petition was withdrawn, as indicated by you.

Trial Examiner: Is the addition to the stipulation satisfactory?

Mr. Moore: It is acceptable.

Mr. Winograd: Yes.

Trial Examiner: All right.

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Does the General Counsel offer in evidence his Exhibit 3-A to 3-C for identification?

Mr. Moore: I do.

Trial Examiner: I take it there is no objection?

Mr. Eltman: No objection.

Trial Examiner: I receive them.

(Thereupon, the documents above-referred to were marked General Counsel's Exhibits 3-A, 3-B, and 3-C in evidence.)

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FRANCIS TURSI, was called by and in behalf of the Respondent, and having been previously duly sworn, was examined and testified as follows:

Direct Examination:

Q. (By Mr. Eltman) * * *

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Q. Can you approximate the time of the year with respect to the years when each of these visits were made to you? A. About six months before.

Q. Before— A. This case.

Q. Before Mr. Cody called upon you? A. Yes, sir.

Q. Was that the only time you were visited by a union official other than by Mr. Cody? A. No, about a year before that—I mean six months before that.

In other words, a year before this case.

Q. Was it the same union official? A. No, it was a different man.

Q. On any of these occasions did these men tell you they represented your employees? A. Yes, sir.

Q. What did you say to them? A. I didn't believe it.

Q. Did you ask them to prove it?

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A. Yes, sir.

Q. Were they able to prove it? A. No, sir.

Q. Did you report these incidents to your men?

Mr. Moore: I object, the thing is totally irrelevant. This is six months before the case which we now have under consideration.

Mr. Eltman: I think I can demonstrate the materiality and relevancy. I won't have more than one question beyond this.

Trial Examiner: You may ask it.

The Witness: Yes, sir.

Q. (By Mr. Eltman) Did you have any social contact with your employees, Mr. Tursi? A. Yes, sir.

Q. Will you describe the nature of that contact? A. We used to go bowling once a week. I have dinner, I had dinner at their homes, they had dinner at my home, at my house—and we were real friendly, I mean, we live in the same neighborhood, I live in the same home as Al Petrillo, one block away,—by the same home I mean the same building. Very friendly.

Q. As a matter of fact, some of these employees are older than you, aren't they? A. Yes, sir.

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Q. On these occasions when you went bowling with them or when you had dinner with them or they had dinner with you, did you have occasion to mention the visits of these union officials? A. Yes, sir.

Q. Let's come out to March 19, 1955, when Mr. Cody testified he came in to see you, that was on a Saturday, wasn't it? A. Yes, sir.

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Q. Did he show you anything else that day? A. Yes, sir, he showed me a contract, a printed form.

Q. I show you Respondent's Exhibit No. 2 in evidence, and ask you if this is the document he showed you that day?

Trial Examiner: I believe we are already agreed it is a copy thereof.

Mr. Eltman: Well, I want to go a little further. Is that the document he gave you that day?

The Witness: It looks like it.

Q. (By Mr. Eltman) Well, did he ever give you that

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document at any other time besides? A. No, this must be it, that time. I know I got this, and that must be the time I got it.

Q. If I were to tell you that that was a document that you gave me the other day, what would your answer be to the question I now ask you again?

Mr. Moore: I object.

Trial Examiner: There is no problem about this.

I believe the General Counsel and counsel for the union concede that it is—Cody offered the witness either this document, or one exactly like it.

Mr. Eltman: I think the witness' doubt concerns itself with whether that was the contract he gave me the other day. He knows the General Counsel just gave me a contract, and he just wants to make certain that he is talking about the same contract that has been in his possession since March 19th.

Mr. Moore: We accepted this document under a stipulation, and I don't believe the testimony should be to change it.

Mr. Eltman: But the witness did not know that this was the document that he had in his possession the other day. Are you aware of the fact, Mr. Tursi, that that is the contract you gave me the other day?

The Witness: Yes, sir.

Q. (By Mr. Eltman) Now I ask you again, is that the document Mr. Cody gave you?

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A. Yes, sir.

* * *

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Q. It has been testified that you drove up in your car and that Mr. Cody approached you and had a conversation with you? A. Yes, sir.

Q. What did Mr. Cody say to you and what did you say to him while you were seated in your car? A. He told me he was going to give me one more chance to sign that contract as is, or I was going to have a strike that morning.

Q. What did you tell him? A. I told him to go see my lawyer.

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Q. Did he reply to that? A. He told me there was no use seeing my lawyer, because that is the contract, and I must sign that; and why should I see a lawyer.

Q. Was there anything else said between you and Mr. Cody? A. No, sir.

Q. Did you and the men, did you and several of your employees go into your office? A. Yes, sir.

Q. Can you tell us who was present? A. Al Petrillo, Arthur Messina, Tony Addeo, Casillo and Stephan, and Honer.

Q. Will you tell us as best you can recall what was said in your office that morning by you and by any of the other men? A. Well, I, I tried to have a man talk with them. I knew these boys, I say, very well—their families and everybody, and there was no boss-employee relationship—I asked them what was the problem, what was it all about. To me it was plain simple—I mean, a mystery. So they, they were in a line, I mean, it happens like that, because there is a counter there, like any store has a counter. And I am sorry, I can't remember who spoke first, or who was first, and I asked them, what was the problem; and the first man, I believe, said, well, he said they were working too many hours. And the second

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man said, "We are not getting enough money."

And then another man said, "We'd like to have our hospitalization paid for."

And I agree. I said, "Well, why don't we discuss these things like gentlemen?" I mean, after all, as I say, we were very good friends, we always were. I said, "Let's discuss it."

But finally the fourth man, who was Al Petrillo—I mean, that is the one I remember most. He said, "What is the sense discussing it; you either sign a contract the way it is, or we are going to go on strike."

Q. Now, it has been testified here that you said "It is against my religion," and then something else was said after that; do you recall making any statement in which you said it was aginst your religion to do something? A. The statement I made, which—the statement I made was, "It is against my religion to force any man to do anything he doesn't want to do."

Q. It has also been testified that you made references to your demise—in other words, you said, "I would die first before doing something;" do you recall making that statement? A. No, sir.

Q. How long were the men in your office that morning? A. If—

Trial Examiner: Excuse me, the last question was whether

the witness recalls making the statement. The answer of the witness was in the negative, and it was emphatic. I construe it to be an answer that it isn't a matter of recollection solely, that he is certain he didn't make the statement. Is that right?

The Witness: Yes, sir.

Mr. Eltman: That was the intent.

Trial Examiner: All right, I think it may have been your intent, but I want the record to be clear.

Q. (By Mr. Eltman) I think the question put to you was, the last question was how long were the men in your office that morning? A. Not too long. I'd say 35, 40—25, 30 minutes. It wasn't long; it wasn't a long period.

Q. Did they subsequently leave? A. Yes, sir.

Q. What happened then? A. They went out in the car—

Q. Whose car? A. Mr. Cody; and he gave them cards, and they started to picket.

Q. Did they picket all that day? A. Yes, sir.

Q. That was Friday? A. Yes.

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Q. Incidentally, for how long a period of time was there one or more pickets in front of your place of business? A. Approximately three weeks.

Q. During that period of time when the employees were picketing, did you have any conversations with these men while you either went into the plant or came out of the plant? A. Yes, sir.

* * *

Q. (By Mr. Eltman) During any of those conversations did any of those men ask you for the opportunity of returning to work? A. Yes, sir.

Q. Who asked you, who told you they wanted to come back to work? A. The first one was Petrillo, Messina, I am sorry, Messina.

Q. Do you remember when it was that he asked you to go back

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to work? A. Two or three days after—after they started to picket.

Q. Did Messina go back to work? A. Few days later, yes, sir.

Trial Examiner: He did return?

Mr. Eltman: Yes, sir.

Mr. Moore: The ledger sheet shows that he re-

ceived $28.34 for the week ending March 29th; and then on April 5th, he received $60; and then $90 or $95 per week thereafter, up through May 10th, so that he was rehired after the strike.

Mr. Eltman: He was rehired during the strike.

Mr. Moore: After the strike started.

Mr. Eltman: That is right. Messina was rehired.

Trial Examiner: And he is included among the employees named in Mr. Cohen's letter of June 10th to the respondent?

Mr. Moore: That is correct.

Now, his last date of working there was during the week ending May 16th.

Trial Examiner: All right.

Q. (By Mr. Eltman) Did anyone else ask you for the opportunity of going back to work? A. Tony Addeo?

Q. When did he talk with you? A. A few days after the strike started.

Q. Did Tony Addeo go back to work?

A. Yes.

Trial Examiner: Let's hear what the ledger shows with respect to Addeo.

Mr. Moore: It shows that he worked during the week ending March 29th, and was paid $25. The record then shows that he next received payment for services rendered during the week ending April 19th and thereafter he worked up through July 26th.

Q. (By Mr. Eltman) Since the day the strike began, has any other man, other than Addeo and Messina, spoken

to you about a desire to go back to work for you? A. No, sir.

Mr. Eltman: May I have the letters that are in evidence, General Counsel's Exhibits 3-A, B and C?

Q. I show you General Counsel Exhibit 3-A and ask you if you recall when it was that you received that? A. I'd say approximately June 13th or 14th.

Q. And what did you subsequently do with that letter? A. I forwarded it to you.

Q. Did you and I have a discussion concerning this letter? A. Yes, sir.

Q. Did you give me certain instructions with respect to this letter? A. Yes, sir.

Q. What were those instructions?

* * *

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The Witness: In reference to the letter I said I'd be very happy to have those men back in my employ.

* * *

Intermediate Report and Recommended Order.

IR-803
Massapequa, N. Y.

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
Washington, D. C.

—o—

SUNRISE LUMBER & TRIM CORP.[1]
and
LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L.[2]

Case No. 2-CA-4406.

—o—

Lewis Moore, Esq., of New York, N. Y., for the General Counsel.

Alexander Eltman, Esq., and Joseph T. King, Esq., of New York, N. Y., for the Respondent.

Samuel J. Cohen, Esq., by Donald S. Winograd, Esq., of New York, N. Y., for the Union.

Trial Examiner: A. Bruce Hunt.

[1] Herein called the Respondent.
[2] Herein called the Union.

STATEMENT OF THE CASE.

Charges having been duly filed, a complaint and notice of hearing thereon having been issued and served by the General Counsel, and an answer having been filed by the Respondent, a hearing involving allegations of unfair labor practices in violation of the National Labor Relations Act, 61 Stat. 136, herein called the Act, was held upon due notice at New York, New York, on November 9 and 10, 1955, before the undersigned Trial Examiner. The allegations of the complaint, denied by the answer, in substance are that (a) on March 19 and 25, 1955, and thereafter, the Respondent refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, although a majority of said employees had designated the Union as their representative for such purposes, in violation of Section 8 (a) (5) and (1) of the Act; (b) during March and April 1955, the Respondent interrogated its employees concerning their union affiliation and activities, and offered its employees wage increases and other improved working conditions if they would refrain from becoming or remaining members of the Union, in violation of Section 8 (a) (1) of the Act; (c) as a consequence of the Respondent's conduct, on March 25, 1955, certain of its employees ceased work concertedly and went on strike; (d) thereafter, the Respondent, by threats of reprisals and promises of benefit, solicited its striking employees to return to work and to abandon the Union, in violation of Section 8 (a) (1) and (5) of the Act; and (e) during June 1955, the Respondent refused, and has since continuously refused, to reinstate its striking employees for the reason that they joined or assisted

the Union and had engaged in the strike, in violation of Section 8 (a) (3) and (1) of the Act. All parties were represented by counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to

argue orally upon the record, and to file briefs and proposed findings and conclusions. Oral argument was waived by all parties, however, except for the citation of authority by the General Counsel. On December 8, 1955, the Respondent filed a brief. The Respondent's motion to dismiss the complaint, made at the close of the hearing, is disposed of in accordance with the determinations below.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT.

I. The Business of the Respondent

The Respondent, a New York corporation, maintains its office and place of business at Massapequa, New York, where it is engaged in the manufacture and sale of lumber, milled products, building supplies, and related products. During the year 1954, the Respondent purchased products, including lumber, insulation, sheet rock and flooring, valued in excess of $585,000, which were shipped to it directly from points outside the State of New York. There is no dispute, and I find, that the Respondent is engaged in commerce within the meaning of the Act.

II. The Labor Organization Involved

Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

A. F. L., is a labor organization admitting to membership employees of the Respondent.

III. The Unfair Labor Practices

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A. *Chronology of events*

On March 18, 1955, three of the Respondent's truck-drivers met with John Cody, the Union's business agent. Those employees, Alexander M. Petrillo,[3] George Stephan and Arthur Messina, expressed a desire to be represented by the Union and they signed cards which authorized the Union to enter into an agreement with the Respondent requiring membership in the Union as a condition of employment.[4] On the next day, John Honer, another truck-driver, and Anthony Addeo, a yardman, signed like cards. Also on March 19, Cody called at the plant and talked with Francis J. Tursi, the Respondent's president. Cody related the purpose of his visit and Tursi asked which employees Cody was "going to organize." Cody answered: "* * * the truck drivers and the one yard man * * *" Tursi asked if Cody possessed authorization cards, and Cody answered that he possessed six cards although only five had been signed. Tursi requested an opportunity to inspect them, but Cody refused to let him do so. Cody produced a printed form contract and offered it to Tursi, saying that it "was what we [the Union] were asking for." Tursi told Cody to give the form contract to Tursi's lawyer, whom Tursi did not identify, saying that it "was against his religion to be unionized * * *" and ordering

[3] At various places in the transcript, "Petrillo" is erroneously spelled "DeTrillo." These errors are hereby corrected.

[4] The cards of those three employees are incorrectly dated March 19, 1955.

Cody to "get the hell off of my [the Respondent's] property and stay off." Cody departed.[5]

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On March 27, Cody met with several of the employees who had signed cards. Also present was Sylvestro Casillo, a truckdriver, who at that time signed a card of the type which the other employees had signed. On the next day, the Union filed with the Regional Director a petition in case number 2-RC-7393, alleging that the appropriate unit consisted of the "Chauffeurs and Yardman."

On March 25, Cody visited the plant and met with the six employees who had signed cards. They told Cody that they wished to strike if need be to obtain recognition of the Union. Soon thereafter, Tursi arrived at the plant. Cody told him that the men would strike in order to achieve recognition of the Union, and Tursi asked if Cody would object to Tursi's meeting with the men outside the presence of Cody. There was no objection by the men and Cody consented. The men went with Tursi to his office.[6]

[5] The findings concerning this conversation are based upon the testimony of Cody. On the other hand, Tursi's version of the conversation differs in various respects. According to Tursi, Cody said that the purpose of his visit was to organize the "whole plant," rather than the truckdrivers and yardman, and Cody did not say how many cards he possessed. Tursi testified also that Cody told him that the form contract must be signed without modification, else

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there would be a strike, to which Tursi replied that Cody should see his lawyer, giving the name and address, and that Cody answered that it was pointless to see the attorney because the form contract had to be signed in order to avoid "trouble." Tursi acknowledged that he "asked * * * [Cody] to leave" the premises, but Tursi did not deny having done so by ordering Cody to "get the hell off * * * and stay off." As appears elsewhere herein, I am unable to credit Tursi's testimony in various instances, and I reject his version of the above conversation.

[6] The finding concerning Cody's remark to Tursi is based upon Cody's testimony and the finding concerning Tursi's request to speak with the men outside the presence of Cody is based upon the testimony of Cody, Honer, Petrillo and Stephan. On the other hand, Tursi testified that Cody said to him that there would be a strike unless Tursi signed the form contract without modification and that Cody again rejected his suggestion that Cody see his lawyer. Tursi testified further that nothing else was said between himself and Cody, and he offered no explanation of the circumstances under which the men accompanied him to his office.

During the meeting which followed, one of the employees returned to Cody and obtained a printed form contract of the type which Cody had offered to Tursi on March 19, and reference was made to the document in the meeting. Tursi said to the men that he opposed having a union in the plant and he inquired about the men's grievances. Foremost among the grievances were the hours of work, 10 hours a day for 6 days a week, and the wages which ranged from $75 per week for Addeo to $85 for the highest paid truckdrivers. Tursi made a series of offers to the men conditional upon their disavowal of the Union, each of which was rejected in turn. The initial offer was a raise of $5 to each man, which was followed by offers of a $90 wage to each one, one half a day off a week, and finally a full day off a week. There was also an offer to pay certain hospitalization expenses of the men. In rejecting the offers, the men told Tursi that they would not forego representation by the Union, and Tursi replied that it was against his religion to have a union in the plant. The men said that they would start striking, and the meeting ended.[7] The men returned to

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the place in the plant where Cody was waiting, received strike placards from him, and began picketing. The picketing continued for a period of weeks.

[7] These findings are based upon the testimony of Homer, Petrille and Stephan who impressed me as reliable witnesses. On the other hand, Tursi's version of the conversation is that he "tried to have" a conversation with the men, that he asked "what was the problem," that one of the men said that the hours of work were too long, another said that the wages were too low, and a third said that they would "like to have * * * [their] hospitalization paid for." Thereupon, according to Tursi, he said, "why don't we discuss these things like gentlemen?", but one of the men said that it was pointless to do so because the men would strike unless Tursi signed the form contract "the way it is." Tursi denied having said to the men that it was against his religion to have a union in the plant, testifying that he said instead that it was against his religion "to force any man to do something he doesn't want to do." If Tursi's version be accepted, it is apparent that the meeting consumed a few minutes at most. Tursi testified, however, that it consumed 25 to 40 minutes.

Shortly after the strike began, Tursi and Francis Ruiz, a supervisory employee as discussed below, approached employees on the picket line. Ruiz said to them that they were damned fools for not accepting Tursi's offers, and Tursi said that he would sell his trucks and rent other trucks before he would recognize the Union. The employees replied that they would continue striking until the Union was recognized.[8] Within the next few days, Tursi spoke with Honer and Addeo while the latter men were picketing, offering them $25 each if they would unload a freight car. They refused. Sometime later, when Honer was picketing, Tursi told Honer that he would arrange for Honer to install fences which were sold by the Respondent if Honer would purchase a small truck which would be needed. Honer rejected the offer.[9]

On or about April 1 and 18, Messina and Addeo, respectively, requested and received reinstatement. During the forepart of May and June, Messina and Addeo, respectively, ceased work under circumstances which are not disclosed in the record and which are not alleged to have been unfair labor practices.

As recited above, a petition was filed by the Union. On April 5, a conference was held in connection with the matter, but it was unfruitful because the Respondent and the Union did not agree upon the unit alleged in the petition to be appropriate. On May 24, the Union filed its initial charge in this proceeding, and on June 10 it filed a request to withdraw the petition which was approved by the Regional Director.

[8] These findings are based upon the uncontradicted testimony of Petrillo. Tursi did not deny having engaged in the conversation. Ruiz was not a witness.

[9] These findings are based upon the uncontradicted testimony of Honer.

Also on June 10, Samuel J. Cohen, counsel for the Union, wrote to the Respondent and demanded the reinstatement of Messina, who had been reinstated and whose employment had been severed before June 10 as recited above,

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and Casillo, Honer, Petrillo, and Stephan. No request was made for the reinstatement of Addeo who also had been reinstated and whose employment had been severed before that date. Tursi delivered Cohen's letter to his attorney, Alexander Eltman, with the information, according to Tursi's testimony, that he would "be very happy to have those men back in" his employ. In its brief, the Respondent says that Tursi instructed Eltman to arrange the reinstatements of the men. On June 19, however, when Eltman responded to Cohen's letter, he did not inform Cohen that Tursi would reinstate the men or that he had been instructed to arrange the reinstatements. He said noncommittally that he would be pleased to discuss the matter and requested that Cohen telephone him. On June 22, Cohen tried unsuccessfully to reach Eltman by telephone, and on that or the next day Eltman returned the call without reaching Cohen. Thereafter, at undisclosed dates before July 1 or after July 31, during which month Cohen was on vacation, he tried without success to reach Eltman by telephone. There was no further correspondence between the attorneys, and Casillo, Honer, Petrillo and Stephan were not offered reinstatement.

B. *The refusal to bargain collectively*

1. The appropriate unit

The Respondent's plant consists of an office structure, in which office and sales functions are performed, a mill and a lumberyard. The complaint alleges that the appropriate

unit consists of the truckdrivers and yardmen alone and that salesmen, millhands, part-time employees and supervisors should be excluded. According to the General Counsel's contention, there are six employees in the unit, namely, the five truckdrivers, Casillo, Honer, Messina, Petrillo and Stephan, and the yardman, Addeo. On the other hand, as

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related below, the Respondent asserts that 14 additional employees should be included. All parties would exclude certain fence installers and the office and clerical employees.

The truckdrivers were engaged primarily in delivering materials to customers and, upon occasions when materials had to be exchanged, in receiving such materials from customers and returning them to the plant. At the beginning of each workday, the drivers received their assignments from Ruiz, the foreman of the drivers and yard employees, and each driver loaded upon his truck the materials called for by the customers' orders. Upon occasions when the materials could not be handled by one man, the drivers were assisted by another driver or Addeo in loading the trucks and making deliveries. After returning to the plant, the drivers were given additional assignments by Ruiz. According to the uncontradicted testimony of Honer and Petrillo, these two truckdrivers spent, respectively, about 60 and 95 percent of their working time in this work. Stephan, the only other truckdriver who was a witness, testified that he spent about 90 percent of his working hours in a combination of this work and infrequently unloading freight cars. In conformity with State law, each of the drivers possessed a chauffeur's license.[10]

[10] As will appear, the Respondent asserts that a number of other employees drive trucks, but the record does not disclose whether they possess chauffeurs

(Footnote continued on following page.)

In addition to the work described above, the truckdrivers performed other tasks. Honer testified that upon assignment by Ruiz he spent from 20 to 30 percent of his working time in making fences, sometimes assisted by Addeo; and that no other truckdriver engaged in that task. Honer's work in this connection was performed at the plant with a portable jigsaw and is not to be confused with the work of fence installers described below. Another type of work which the drivers performed was to remove lumber from freight cars, which consists of placing the lumber on trucks, hauling it to the plant, and stacking it. Honer testified that from 5 to 10 percent of his working time was so spent while Stephan testified that he performed this work only

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about "three times a month." It is clear from the testimony of Honer, Petrillo, and Stephan concerning the percentage of their time which was spent in delivering materials that only a small portion of their working hours was spent in removing lumber from freight cars, and there is evidence that the work was done at times by stevedores who were not among the Respondent's employees.

Still other types of work which some or all of the truckdrivers performed, generally on busy days such as Saturdays when cash-and-carry customers called at the plant, and on rainy days when some products could not be transported without risk of damage from the rain, were to fill the orders of customers who wished to take their purchases with them, to clean up the yard, saw lumber, and assemble ping pong tables.

(Footnote continued from preceding page.)
licenses. In connection with the State's requirement that all truckdrivers possess such licenses, Tursi gave conflicting testimony. Thus, he first testified that he did not know of such a requirement. He acknowledged, however, that in hiring Honer he inquired if Honer possessed a chauffeur's license and that he prohibited Addeo's driving a truck upon learning that Addeo did not possess such a license. After testifying concerning these incidents, Tursi testified that he believed that the State does require such a license.

We turn from the work of the truckdrivers to that of the yardman, Addeo. As recited above, he assisted truckdrivers in loading trucks and making deliveries, and he worked with Honer in making fences. In addition, he participated in unloading freight cars and filled the orders of cash-and-carry customers. Not having a chauffeur's license, as set out in footnote 10, he did not drive a truck.

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The board has held, in a case involving a business enterprise similar to that of the Respondent, that truckdrivers and yardmen constitute an appropriate unit. *Burton-Lingo Company*, 91 NLRB 5. The Respondent argues in its brief, however, that a number of its employees "cannot be distinguished, occupationally, from the six alleged truck drivers and yardmen" and that "the work of its employees was so variegated as to render impossible the formulation of a unit based on craft skills or occupational duties such as 'truck driver' or 'yard-man.'" Our next question, therefore, is whether certain other employees should be included in a bargaining unit with the drivers and yardman, as the Respondent contends, and we turn to a discussion of the duties of such other employees. In this discussion the issues sometimes turn on the resolution of conflicting testimony because the Respondent's payroll records are blank in spaces designed to recite the nature of an employee's work and do not contain other entries to show the number of hours each employee worked each week or whether the basis of compensation was hourly or otherwise.

Grant Kreinberg and Norman Half are part-time employees who regularly work on Saturdays and at times on such holidays as the Respondent is open for business. They have employment elsewhere for 5 days each week. As

employees of the Respondent, they work in the yard, filling the orders of cash-and-carry customers, loading lumber upon trucks, and performing miscellaneous tasks. The General Counsel contends that they are regular part-time yardmen, but he would exclude them from the unit because their principal employment is with other employers. I reject this contention and I find that Kreinberg and Haff should be included in the unit. The fact that a regular part-time employee holds a full-time job elsewhere does not *per se* affect his inclusion within a bargaining unit. Cf. *Personal Products Corporation*, 114 NLRB No. 150.

Leonard Kuntz, who also worked on Saturdays only, was employed on February 5, 1955, and resigned on March 19, 1955. There is testimony by Tursi

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that Kuntz did "everything," working in the yard, waiting on customers, unloading lumber, driving a truck, etc. On the other hand, there is testimony by Honer that Kuntz worked in the office as a salesman, selling small items which were displayed there and taking orders of customers for other products. This conflict need not be resolved because Kuntz' last day of employment was the day of the Union's initial demand for recognition. Since he was not an employee on the date of the refusal to bargain recited below, he will be excluded from the unit.

Eugene Duranty is a regular full-time employee. The record is incomplete concerning his duties, however. According to Tursi, Duranty's duties are to do "everything," but Tursi could not relate the proportion of time which Duranty spent in any type of work. Duranty earned $110 per week which was $25 in excess of that earned by the highest paid truckdrivers. As appears herein, I have been unable to credit Tursi's testimony in various instances. In

this instance, however, Tursi testified without contradiction that Duranty is the Respondent's "most experienced lumber driver," having worked in the lumber business before becoming employed by the Respondent. This factor, coupled with the facts that the Respondent had six trucks and that only five employees were identified as regular drivers, warrants an inference that Duranty may have devoted a substantial portion of his working time to delivering materials to customers by truck. Under the circumstances, being unable to determine that Duranty should be in or out of the unit, I shall include his name when considering the Union's majority status below. See footnote 14.

Ruiz, the foreman of truckdrivers and yard employees, is described by the Respondent as "a working foreman" who is not a supervisor within the meaning of the Act. He earned $115 a week, which is well in excess of that earned by the truckdrivers and Addeo, and the Respondent asserts that that figure includes extra compensation because it required Ruiz to work during the 2 nights each week that the Respondent is open for business. Although Tursi testified that Ruiz performed various functions around the yard, it is

clear that his work is supervisory and that he should be excluded from the unit because he is a supervisor within the meaning of the Act. As already recited, he gave the truckdrivers their daily work assignments. He also assigned overtime work. He offered Honer a transfer from a job in the plant's mill to that of truckdriver, which Honer accepted. He participated with Tursi in interviewing applicants for employment and made effective recommendations to Tursi. Thus, while Tursi testified that he would "listen" to Ruiz' recommendations and himself make the "final

decision," it is clear from the uncontradicted testimony of Stephan that when Stephan was hired he was sent by Tursi to Ruiz, who questioned Stephan concerning his qualifications and who told Tursi to "put * * * [Stephan] on the payroll."

Al Falciano and Walter Lehman work in the plant's mill making such articles as cabinets for kitchen and other uses, sink tops and scallops for cornices. Falciano is the more experienced and capable millman, and his weekly earnings during March 1955 ranged from about $120 to $145.[11] Lehman earned slightly more than $100 during the 1 week that the record discloses his earnings. Upon occasion, such as on busy Saturdays, they filled the orders of cash-and-carry customers and performed other tasks. I find that the principal duties of Falciano and Lehman are dissimilar to those of the truckdrivers and the yardmen, that they are under different supervision, and that they should be excluded from the appropriate unit.[12]

[11] There is evidence that Falciano performed supervisory functions. Thus, Honer testified that when he was hired as a millworker he applied to Tursi who referred him to Falciano, that Falciano inquired about his qualifications, that thereafter Tursi asked Falciano: "Will he [Honer] do?", that Falciano answered: "Yes," and that Tursi thereupon hired Honer. Honer also testified that Falciano is "in charge of the mill." The General Counsel asserts that Falciano should be excluded from the unit because his duties are unlike those of the truckdrivers and yardmen and that perhaps he also should be excluded as a supervisor within the meaning of the Act. I believe it is unnecessary to determine whether Falciano is such a supervisor.

[12] The findings concerning the work of Falciano and Lehman are based upon the testimony of witnesses for the General Counsel. On the other hand, Tursi testified that both Falciano and Lehman did "everything" around the plant, loading and unloading trucks, driving trucks, unloading freight cars, etc. This testimony is unpersuasive when one considers Tursi's entire testimony. Thus, Tursi testified that during a particular week in March 1955 Falciano performed the same types of work as a truckdriver, Petrillo, although Falciano earned $145.87 and Petrillo earned $84. Tursi's explanation for Falciano's much higher earnings is that Falciano worked on the Sunday of that week and that Falciano is able to perform "many duties" which Petrillo is unqualified to perform, such as making cabinets. Tursi also testified that Falciano advises customers on such matters as how to erect doors and the materials needed therefor.

Aniello Spampanato is a part-time employee. During the first quarter of 1955, he worked only 1 week during January and returned to work about February 1. During the workweeks ending March 1 through March 29, he did not work for the Respondent, but he again returned to work during the workweek ending April 5. According to Tursi, Spampanato was laid off in late February because his services were not needed. Tursi testified that Spampanato was a yardman, doing "whatever had to be done." The record shows, however, that

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during a single workweek in February Spampanato earned $171.92 as compared with the $75 weekly which was earned by Addeo, the full-time yardman. Tursi testified that he could not recall the work which Spampanato performed to earn that amount of money, but that at times Spampanato does maintenance work on the Respondent's buildings. In view of Spampanato's relatively high earnings, I find that he is not a yardman. I find also that he is an irregular part-time

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employee who performs building maintenance work for the Respondent as needed. As an irregular part-time employee and as a maintenance man, he is to be excluded from a unit of truckdrivers and yardmen.

John Pehowdy, in the words of Tursi, has "25 years in the lumber business" and is the Respondent's "only experienced lumber man." His weekly pay at one time in 1955 was $125, later becoming $135, and Tursi testified that these amounts included extra compensation for working during the 2 nights each week that the Respondent is open

for business.[68] Tursi testified also that Pehowdy performed various types of work such as working in the yard, waiting on customers, and loading and unloading trucks, but it is clear that Pehowdy is not a yardman. Pehowdy's earnings far exceed those of the full-time yardman, Addeo. Moreover, Tursi's testimony shows that Pehowdy is a valued advisor in a major component of the business. Thus, according to Tursi, he once purchased lumber at a cost of $3,000 to $4,000 without obtaining the advice of Pehowdy with the result that Tursi could not dispose of the lumber and suffered the monetary loss, whereas he would not have made the purchase had he obtained Pehowdy's advice. I find that Pehowdy should be excluded from a unit of truck-drivers and yardmen because he works under different supervision and, as an experienced lumber man, performs work which is specialized and unlike that of the employees in the unit.

Norman Vogeney, a retired Army officer, began work for the Respondent in 1950 or 1951. He worked in the office, but because he frequently was absent from work he was given other duties. When working in the yard, he performed tasks assigned to him by Ruiz such as filling orders for cash-and-carry customers. His work continued to be irregular, however, and it appears that he reported for work at times suitable to him rather than to

the Respondent. During January 1955, Vogeney worked 3 days or less, during February he did not work, and dur-

[68] Pehowdy did not work for the Respondent at the times of the Union's demands for recognition, and the weekly earnings set forth above are amounts which he received thereafter. He had been absent from work during the period of mid-July 1954 to mid-April 1955. I deem it unnecessary to decide the questions whether Pehowdy was on a leave of absence during that period and whether he is a regular full-time employee.

ing March, the month in which the Union made its bargaining demands, he worked 3 or 4 days each week. I find that Vogeney is an irregular part-time employee who should be excluded from the unit for that reason.

Kenneth Hobbie, Tom Dunican, Cameron Witmar and Charles Hammer are engaged in sales and construction work. Hobbie deals with customers in such matters as building garages. He estimates the costs and solicits the orders. When an order is received, he obtains the necessary construction permit, compiles a list of needed materials, hires persons to do the concrete and carpentry work; and oversees the construction. He has a drawing account of $50 weekly and is paid a percentage of the profits on each of his projects. Dunican performs the same type of work and is compensated upon a like basis. Witmar, who may have been a new or part-time employee at times material, also performed that type of work, but his method of compensation is not disclosed in the record. Hammer's work is confined to fences which are erected under his supervision after he receives orders therefor. The fences are erected by fence installers whom none of the parties would include within the unit. Hammer is paid a percentage of the profits on each of his projects. To some extent,

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according to Tursi, these four employees drive trucks in delivering materials to their respective projects. It is clear, however, that their supervision, if any, their work and their basis of compensation set them apart from the truckdrivers and yardmen, and I find that they should be excluded from the unit.

I find that the Respondent's truckdrivers and yardmen constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

2. The Union's majority status.

We have seen that on March 23, 1955, the Union possessed six cards which had been signed by employees in the unit and which authorized the Union to execute a collective labor agreement requiring union membership as a condition of employment. Although the cards do not expressly designate the Union as the employees' representative for purposes of collective bargaining generally, such designation is inherent therein. Cf. *Lebanon Steel Foundry v. N. L. R. B.*, 130 F. 2d 404 (C. A. D. C.), cert. den. 317 U. S. 659. We have seen too that on March 25 the same six employees began a strike and engaged in picketing, seeking thereby to achieve recognition of the Union as their representative. It is well established in Board and Court law that voluntary participation in strike activity by employees constitutes a designation of the sponsoring labor organization as their representative. *Seven-Up Bottling Company of Miami, Inc.*, 92 NLRB 1622, enfd. 196 F. 2d 424 (C. A. 5). These six employees constitute a majority of the nine employees who were in the unit on those dates. Accordingly, I find that on March 23, 1955, and at all times thereafter, the Union was the duly designated representative of a majority of the employees in the appropriate unit and, pursuant to Section 9 (a) of the Act, was the exclusive representative of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

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3. The refusal to bargain

On March 25, 1955, as found above, Tursi rejected Cody's demand for recognition of the Union and thereafter offered improved working conditions to the 5 truckdrivers and Addeo if they would repudiate the Union. Following the rejection of such offers, Tursi again refused to recognize the Union and the employees began a strike. The Respondent advances several defenses to its refusal to bargain. The defense that the unit is inappropriate has been disposed of above. The Respondent asserts too that there "is not sufficient proof in the record that the union ever claimed to represent a majority of any 'group' or number of employees; or that Cody showed any such proof to respondent." This contention is unpersuasive. It has been found that Cody claimed to represent the truckdrivers and the full-time yardmen. Moreover, if Tursi was unaware of the Union's unit claim and majority status before March 25, he was enlightened by the events of that day. This is so because Tursi knew whom Cody claimed to represent when Tursi asked Cody if he could speak with the 5 truckdrivers and Addeo, and he learned from those employees orally and by their strike activity that the Union represented them. Another defense is that "any alleged refusal to bargain" by the Respondent "was offset by the union's refusal to bargain," that is, by the Union's submission of a printed contract to Tursi with an alleged "sign or else ultimatum" which removed the possibility of good faith negotiations. This defense is grounded in Tursi's testimony, which has been rejected. See footnotes 6 and 7. Still another defense, that the entire

complaint must be dismissed on the ground that the Union and the striking employees sought an unlawful contractual provision, is rejected in Section III, D, below. I find that the Respondent, by its rejection of the Union's demand for recognition on March 25, 1955, and thereafter, refused to bargain collectively in violation of Section 8 (a) (5) and (1) of the Act.

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With respect to Tursi's offers of improved working conditions to the employees on March 25 if they would repudiate the Union, the Respondent argues that the offers were an "exercise of free speech" by Tursi. It is well settled, however, that such offers are not protected by Section 8 (c) of the Act. *N. L. R. B. v. Electric City Dyeing Co., et al.*, 178 F. 2d 980 (C. A. 3), enfg. 79 NLRB 872. The Respondent also argues that Tursi's offers were "condoned" by the Union when, I infer, Cody consented to Tursi's speaking with the 6 employees outside Cody's presence. I disagree. I do not regard Cody's consent as containing advance approval of the commission of unfair labor practices, but, assuming the contrary, such approval is not binding upon the Board in the performance of its statutory functions. The Respondent having been obligated to deal only with the employees' chosen representative, its offers of improved working condition to the employees were violative of Section 8 (a) (5) and (1) of the Act.

C. Interference, restraint and coercion

During the course of the strike, as recited above, Tursi said to employees on the picket line that he would sell his

trucks and rent other trucks before he would recognize the Union. This remark, being tantamount to a threat to abolish the jobs of the striking truckdrivers, was violative of Section 8 (a) (1) of the Act. As we have seen, Tursi also solicited Honer and Addeo to return to work, and Addeo later obtained reinstatement. The solicitation was calculated to undermine the Union and was a part of the Respondent's pattern of unlawful opposition to the purposes of the Act. It was, therefore, violative of Section 8 (a) (1) of the Act. *N. L. R. B. v. Clearfield Cheese Company, Inc.*, 213 F. 2d 70 (C. A. 3), enfg. 106 NLRB 417; *Efco Manufacturing, Inc.*, 108 NLRB 245.

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D. *The strike and the refusals to reinstate certain strikers*

As described above, on March 25, 6 employees struck to secure recogniteion of the Union. The Respondent argues in its brief that "the purpose of the strike was to force the employer to violate the Act" because (1) the cards which the employees signed allegedly limited the Union's authority to the execution of a contract requiring membership as a condition of employment and (2) the form contract which Cody offered to Tursi on March 19, and which was in use at Tursi's meeting with the employees on March 25, provides for an "illegal union security clause." The provision is as follows:

> SECTION 8 (a): Members of the * * * [Union] to be employed when available, otherwise those who will become members of * * * [the Union] at its next meeting.
>
> (b) If Section 8 (a) of this contract is in conflict with. [*sic*] the Labor Management Relations Act it is

understood and agreed that such provision shall not be operative so long as such conflict exists but shall become operative immediately upon repeal of said Law or upon said Law being determined to be unconstitutional or inapplicable. If Section 8 (a) is not operative for the foregoing reason then throughout the term of this agreement all employees shall be required, as a condition of employment, to become members of the Union on or after thirty (30) days following the beginning of employment or the effective date of this agreement whichever is the later. This requirement is subject to receipt of the necessary certification from the National Labor Relations Board.

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I do not believe that the issues herein require a determination of the alleged invalidity of the quoted provision. If it be assumed *arguendo* that the provision contravenes the Act, its existence in the proposed contract did not relieve the Respondent of the obligation to recognize the Union and to bargain collectively. *N. L. R. B. v. White Construction Co.*, 204 F. 2d 950 (C. A. 5). Moreover, the provision was not mentioned in Tursi's conversations with Cody or the employees, insofar as the record discloses, and the purpose of the strike was not to force the Respondent to agree to the provision. The purpose instead, as the reliable evidence fully establishes, was to overcome the Respondent's opposition to the principle of collective bargaining. I find that the striking employees were unfair labor practice strikers and, therefore, were not vulnerable to refusals to reinstate them.

On June 10, 1955, as recited, Attorney Cohen wrote to the Respondent and demanded the reinstatement of Casillo,

Homer, Messina, Petrillo and Stephan. Although Attorney Eltman, on behalf of the Respondent, replied to Cohen's letter, he did not say that Tursi had instructed him to arrange the men's reinstatement. Instead, Eltman said to Cohen that he would be pleased to discuss the matter. Thereafter, Eltman and Cohen were unsuccessful in their efforts to telephone each other, and Eltman did not at any time offer reinstatement to the men. In its brief, the Respondent asserts that the Union did not make an adequate effort to secure the men's reinstatements. This assertion is patently without merit. The Union was not required to repeat its reinstatement demand. The demand having been made, the Respondent was obligated to grant it. Eltman's noncommittal reply was tantamount to a rejection.

With respect to Casillo, Homer, Petrillo and Stephan, I find that on June 19, 1955, the date of Eltman's letter to Cohen, the Respondent rejected their request for reinstatement. The rejection was in derogation of their statutory rights and constituted violations of Section 8 (a) (3) and (1) of the Act. With respect to Addeo and Messina, we have

seen that they were reinstated and that their employment was later terminated under circumstances which are not alleged to have been unfair labor practices, the reinstatements and terminations both having occurred before the date of Cohen's letter. Accordingly, I reject the General Counsel's contention that the Respondent was obligated to offer reinstatement to Addeo and Messina following the receipt of Cohen's letter. I also reject the General Counsel's contention that Addeo applied for reinstatement

during June 1953 since, for reasons unexplained in the record, Cohen failed to include his name among those for whom Cohen was requesting reinstatement.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section III above, occurring in connection with the operations of the Respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead and have led to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the Union represented a majority of the employees in the appropriate unit and that the Respondent refused to bargain collectively with it. Accordingly, I shall recommend that the

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Respondent, upon request, bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit.[12]

[12] In determining the issues concerning the appropriate unit and the Union's majority status therein, I expressed doubt concerning the inclusion of Duranty. Nothing in the Recommendations herein is intended to require his inclusion within the unit at the times of bargaining negotiations if information in the possession of the parties should demonstrate that he does not spend a substantial portion of his working time in delivering materials to customers by truck.

It has been found also that the employees in the appropriate unit went on strike on March 25, 1955, in protest of the above unfair labor practices, and that on June 19, 1955, the Respondent refused to reinstate Casilio, Honer, Petrillo and Stephan. I shall recommend, therefore, that the Respondent offer to said employees immediate and full reinstatement to their former or substantially equivalent positions (*The Chase National Bank, etc.*, 65 NLRB 827), without prejudice to their seniority or other rights or privileges, dismissing, if necessary, any persons hired by the Respondent on and after March 25, 1955, who were not in the Respondent's employ on that date. I shall also recommend that the Respondent make whole each of said employees for any loss of pay he may have suffered by reason of the Respondent's refusal to reinstate him, by payment to him of a sum of money equal to that which he normally would have earned from the date of the refusal to reinstate, June 19, 1955, to the date of a proper offer of reinstatement, less his net earnings (*Crossett Lumber Company*, 8 NLRB 440, 497-8) during said period, the payment to be computed upon a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289. See also *N. L. R. B. v. Seven-Up Bottling Company, etc.*, 344 U. S. 344. I shall recommend also that the Respondent preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights to reinstatement under the terms of these Recommendations.

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In view of the nature of the unfair labor practices committed, particularly the unlawful refusals to reinstate em-

ployees, I shall recommend further, in order to make effective the interdependent guarantees of Section 7 of the Act, that the Respondent cease and desist from, in any manner, infringing upon the rights guaranteed in said Section. *N. L. R. B. v. Express Publishing Company*, 312 U. S. 426; *N. L. R. B. v. Entwistle Manufacturing Company*, 120 F. 2d 532, 536 (C. A. 4).

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

2. All truckdrivers and yardmen at the Respondent's plant in Massapequa, New York, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. The Union, on March 23, 1955, was, and at all times thereafter has been, the exclusive representative of all employees in such unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

5. By discriminating in regard to the hire and tenure of employment of Sylvestro Casillo, John Honer, Alexander Petrillo and George Stephan, and each of them, and

thereby discouraging membership in a labor organization, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

6. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

8. The Respondent has not engaged in unfair labor practices by the alleged refusals to reinstate Anthony Addeo and Arthur Messina.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, I hereby recommend that Sunrise Lumber & Trim Corp., Massapequa, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., as the exclusive representative of all its employees in the appropriate unit with respect to rates of pay, wages, hours of employment, and other conditions of employment:

(b) Discouraging membership in Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., or any other labor organization of its employees, by refusing to reinstate any of its employees because of their union membership or activity, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment;

(c) Offering its employees wage increases and other improved working conditions for the purpose of undermining their union activities;

(d) Soliciting its employees to discontinue protected concerted activities; and

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. L., or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and

Helpers of America, A. F. L., as the exclusive representative of all the employees in the aforesaid unit and, if an understanding is reached, embody such understanding in a signed agreement;

(b) Offer to Sylvestro Casillo, John Honer, Alexander Petrillo, and George Stephan immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges, in the manner set forth in "The remedy";

(c) Make whole each of the employees specified in the paragraph next above, in the manner set forth in "The remedy," for any loss of pay he may have suffered as a result of the Respondent's discrimination against him;

(d) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights to reinstatement under the terms of these Recommendations;

(e) Post in conspicuous places in its plant at Massapequa, New York, including all places where notices to employees are customarily posted, copies of the notice attached hereto as Appendix. Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(f) File with said Regional Director within twenty (20) days from the receipt of this Intermediate Report and Recommended Order a report, in writing, setting forth in detail the steps which the Respondent has taken to comply herewith.

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It is further recommended that unless the Respondent, within twenty(20) days from the receipt of this Intermediate Report and Recommended Order, notifies said Regional Director in writing that it will comply with the foregoing Recommendations, the National Labor Relations Board issue an Order requiring it to take the action aforesaid.

It is further recommended that the complaint be dismissed insofar as it alleges that the Respondent refused to reinstate Anthony Addeo and Arthur Messina in violation of Section 8 (a) (3) and (1) of the Act.

Dated at Washington, D. C., this 15th day of December 1955.

A. BRUCE HUNT,
Trial Examiner.

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

Appendix attached to Intermediate Report and Recommended Order.

WE WILL NOT discourage membership in LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L., or any other labor organization of our employees, by refusing to reinstate any of our employees because of their union membership or activity, or in any other manner discriminate in regard to their hire or tenure or employment or any term or condition of their employment.

WE WILL NOT offer our employees wage increases or other improved working conditions for the purpose of undermining their union activities.

WE WILL NOT solicit our employees to discontinue protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L., or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement in conformity with Section 8 (a) (3) of the National Labor Relations Act.

WE WILL, upon request, bargain collectively with LOCAL 282, INTERNATIONAL BROTHERHOOD

OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L., as the exclusive representative of all employees in the following bargaining unit with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All truck drivers and yardmen.

WE WILL OFFER to the employees named below immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights or privileges, and make them whole for any loss of pay suffered as a result of our refusal to reinstate them.

Sylvestro Casillo — Alexander Petrillo
John Honer — George Stephan

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All our employees are free to become or remain, or to refrain from becoming or remaining, members in good standing of the above-named union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the National Labor Relations Act.

SUNRISE LUMBER & TRIM CORP.

(Employer)

Dated ..... By .....

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Decision and Order.

115 NLRB No. 127. Massapequa, N. Y.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

—o—

SUNRISE LUMBER & TRIM CORP.,

and

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO.[1]

Case No. 2-CA-4406.

—o—

On December 15, 1955, Trial Examiner A. Bruce Hunt issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that the Respondent cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended dismissal of those allegations. Thereafter, the Respondent, but not the General Counsel, filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial er-

[1] The AFL and CIO having merged, we are amending the designation of the charging Union accordingly.

ror was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and the brief, and the entire record in the case,[2] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[3]

ORDER

Upon the basis of the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National

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Labor Relations Board hereby orders that the Respondent, Sunrise Lumber & Trim Corp., Massapequa, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, as the exclusive representative of the employees in the unit found appropriate in the Intermediate Report, with respect to rates of pay, wages, hours of employment, and other conditions of employment:

(b) Discouraging membership in Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other labor organization of employees, by refusing to reinstate

[2] The Respondent's request for oral argument is denied as the record and brief, in our opinion, adequately set forth the issues and the positions of the parties.

[3] In adopting the findings of the Trial Examiner, we find it unnecessary to pass upon his *obiter* statement that the Respondent would have been guilty of unfair labor practice even if Union Representative Cody had given advance approval of Tursi's offer of improved wages and working conditions made directly to employees.

any of its employees because of their union membership or activity, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment;

(c) Offering its employees wage increases and other improved working conditions for the purpose of undermining their union activities;

(d) Soliciting its employees to discontinue protected concerted activities; and

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, as the exclusive representative of all the employees in the aforesaid appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement;

(b) Offer to Sylvestro Casillo, John Honer, Alexander Petrillo, and George Stephen immediate and full reinstate-

ment to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges, in the manner set forth in the section of the Intermediate Report entitled "The remedy";

(c) Make whole each of the employees specified in the paragraph above, in the manner set forth in the section of the Intermediate Report entitled "The remedy," for any loss of pay he may have suffered as a result of the Respondent's discrimination against him;

(d) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights to reinstatement under the terms of this Order;

(e) Post in conspicuous places in its plant at Massapequa, New York, including places where notices to employees are customarily posted, copies of the notice attached hereto and marked Appendix.[1] Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the

Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(f) Notify the Regional Director for the Second Region, in writing, within ten (10) days from the date of this

[1] If this Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for the words "A DECISION AND ORDER" the words "A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER".

Order what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges that the Respondent refused to reinstate Anthony Addeo and Arthur Messina in violation of Section 8 (a) (3) and (1), of the Act.

Dated, Washington, D. C. Mar 21 1956

BOYD LEEDOM, *Chairman,*
ABE MURDOCK, *Member,*
IVAR H. PETERSON, *Member,*
STEPHEN S. BEAN, *Member,*

(SEAL) NATIONAL LABOR RELATIONS BOARD.

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APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, or any other labor organization of our employees, by refusing to reinstate any of our employees because of their union membership or activity, or in any other

manner discriminate in regard to their hire or tenure or employment or any term or condition of their employment.

WE WILL NOT offer our employees wage increases or other improved working conditions for the purpose of undermining their union activities.

WE WILL NOT solicit our employees to discontinue protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of the right to self-organization, to form labor organizations to join or assist LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement in conformity with Section 8 (a) (3) of the National Labor Relations Act.

WE WILL, upon request, bargain collectively with LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, as the exclusive representative of all employees in the following bargaining unit with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All truck drivers and yardmen.

WE WILL OFFER to the employees named below immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights or privileges, and make them whole for any loss of pay suffered as a result of our refusal to reinstate them.

Sylvestro Casillo	Alexander Petrillo
John Honer	George Stephan

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All our employees are free to become or remain, or to refrain from becoming or remaining, members in good standing of the above-named union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the National Labor Relations Act.

SUNRISE LUMBER & TRIM CORP.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

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Motion to Reopen Record.

To the National Labor Relations Board:

Upon the annexed affidavit of FRANCIS J. TURSI, sworn to the 2nd day of May, 1956, and the exhibit annexed thereto, which exhibit is a news article detailing the criminal record of one JOHN CODY, a principal witness herein, the

Decision and Order of the Board, herein, dated March 21, 1956, and upon all of the proceedings heretofore had and papers on file herein, the Respondent, Sunrise Lumber & Trim Corp. respectfully petitions the Board for an Order opening the record and proceedings herein for the purpose of permitting the Respondent to submit additional evidence, newly discovered, and upon receipt of such evidence, for an Order dismissing the complaint herein.

Dated: May 3, 1956.

Yours, etc.,

JOSEPH T. KING,
33 West 42nd Street,
New York, New York,

ALEXANDER ELTMAN,
350 Fifth Avenue,
New York 1, New York,

Attorneys for Respondent,
Sunrise Lumber & Trim Corp.

To:

The National Labor Relations Board,
Washington, D. C.

Leo Moore, Esq.,
For the General Counsel,
National Labor Relations Board,
2 Park Avenue,
New York, New York.

Samuel J. Cohen, Esq.,
Attorney for Local 282, etc.,
50 East 42nd Street,
New York, New York.

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UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

SECOND REGION

In the Matter
of
SUNRISE LUMBER & TRIM CORP.
and
LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A. F. L.

Case No. 2-CA-4406.

State of New York,)
County of Nassau.) ss.:

FRANCIS J. TURSI, being duly sworn deposes and says:

I am the President of the respondent corporation and respectfully make and submit this affidavit in support of the motion for a reopening of his case for the purpose of adducing additional evidence, newly discovered, which I am advised is material and necessary to this proceeding and essential in the interests of justice, and in order properly to effectuate the purposes of the Act.

In addition, it is requested that, after receipt of the proposed new evidence, the Board set aside its prior decision herein and dismiss the complaint.

The complaint herein alleged certain unfair labor practices, including refusal to bargain, unlawful discharge, discouragement of membership in the charging union, and other like alleged unfair conduct. Hearings on the charges were held before Trial Examiner A. Bruce Hunt on November 9 and 10, 1955.

On December 15, 1955, the Trial Examiner issued his Intermediate Report, finding that the respondent had engaged in and was engaging in most of the unfair labor practices charged.

There were two principal witnesses who testified in the case. I testified on behalf of the respondent and JOHN CODY, a business agent of the charging union, was the principal witness on behalf of the union. My counsel, in their brief to the Trial Examiner, urged the Examiner not to place credence upon CODY's testimony. They pointed out that CODY was an admitted prevaricator and that his falsehoods went to the very essence of the bargaining demand and the all important conversations between said CODY and me alone,

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and to which were no other witnesses. CODY's lies were specifically pointed out.

Despite this, the Examiner chose to believe that CODY was a credible witness and I was not. In each instance where my testimony differed from CODY's, the Examiner believed CODY. For example, in footnote 5 at page 2 of the Intermediate Report, the Trial Examiner says, referring to an important conversation: "The findings concerning this conversation are based upon the testimony of Cody. On the other hand, Tursi's version of the conversation differs in various respects * * * As appears elsewhere here-

in, I am unable to credit Tursi's testimony in various instances, and I reject his version of the above conversation."

In their brief to this Board, my counsel pointed, once again, to the falsehood in Cody's testimony:

This Board, on March 21, 1954, adopted the findings, conclusions and recommendations of the Trial Examiner.

There has recently come to my attention the fact that said JOHN CODY, whose credibility was obviously deemed unimpeachable by the Trial Examiner and this Board, and upon whose testimony the Trial Examiner's recommendations are based, is an ex-convict with a criminal record of eight arrests and three convictions, for which he has spent five years in prison. Annexed hereto and made a part of this affidavit is a photostat of an article which appeared in Newsday, a Long Island daily newspaper, on 19th of April, 1956. It details the criminal record of Cody. That record, far from a pretty one, is as follows:

Convicted of conspiracy. Placed on probation.
Convicted of burglary, committed while on probation. Sentenced to New York Vocational Institution for a 3-year term.
Arrested for burglary. Charge dismissed.
Arrested for burglary. Released.
Arrested for stealing a car. Released.
Convicted of burglary. Sentenced to a 2- to 4-year term at Sing Sing.
Arrested for attempted rape. Freed.
Arrested for mugging. Released.

The past criminal record of the witness CODY, upon whom the Trial Examiner and the Board placed absolute reliance in the disposition of the issues involved herein

was not available to me at the time the hearings were held, I am convinced that, in accordance with well established rules of

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evidence, if the Examiner and the Board knew of the criminal propensities and prior record of said JOHN CODY,—particularly in this case in which credibility is paramount—they would not have been so prone to believe him and disbelieve me and find that he was credible and I was not, which is largely the basis for the decision herein. Had CODY's record been known, it seems to me that the very least I would have been entitled to, was the benefit of a doubt.

I have every reason to believe that this criminal record of CODY's is absolutely correct, but the official record can only be produced by subpoena. I therefore desire the opportunity to furnish the official record with the information concerning the past criminal activities and convictions of said CODY and I respectfully request that this case be reopened so that I may be able to do so. At the time of such reopening, I expect that there will be made available to me the official police department records. I further request that upon the receipt of such newly-disclosed evidence, the complaint herein be dismissed.

FRANCIS J. TURSI.

Sworn to before me this
2 day of May, 1956.
Charles L. Bell,
Notary Public, State of New York,
No. 52-0230175.
Qualified in Suffolk County.
Commission expires March 30, 1957.

EXHIBIT ANNEXED TO AFFIDAVIT OF FRANCIS J. TURSI, SWORN TO MAY 2, 1956

Ex-Con Runs Strike by L[illegible]uns Strike by LI Teamsters

By Bob Greene

A convicted labor hoodlum with a criminal record spanning 18 years has triggered the past three strikes against Long Island Lighting Co. installations, Newsday learned today.

The New York City Police Department disclosed that John Cody, business agent of Local 282, International Brotherhood of Teamsters (AFCIO), has a record of eight arrests and three convictions dating back to 1938. He has spent five of his 36 years in prison.

Cody is now directing a teamsters strike against LILCO installations in Suffolk, which threatens to curtail installation of gas service to thousands of new homes.

The 8-day-old strike has tied up installation of a new gas main between Bohemia and Ronkonkoma. The strike was called against Karlson & Reed, Hicksville, a LILCO subcontractor, in a dispute over the number of trucks to be used on the job.

It is the third such walkout to hit LILCO installations in the past eight months. Twice before—for two days last August and one day last September—the teamsters walked off of Karlson & Reed LILCO jobs in unsuccessful jurisdictional disputes.

In the first of the three strikes, Cody was joined by DeKoning-bossed Local 138, Operating Engineers. Local 138 is not participating in the present walkout.

Cody, a Wantagh resident, is in charge of all Local 282 operations on Long Island. His union has complete jurisdiction over construction trucking in the booming Long Island building industry.

Cody is a lieutenant of John O'Rourke, Local 282 president, who was accused last month by New York District Attorney Frank Hogan of spearheading an underworld attempt to take over the New York trucking industry.

Slim, bespectacled Cody, an ex-New York longshoreman, was first arrested in 1938 at the age of 17. He was convicted of conspiracy and was placed on probation. On Jan. 10, 1939, he was convicted of a burglary committed while on probation, and was sent to the New York Vocational Institution, West Coxsackie, for a three-year term.

When he was discharged from reform school in 1942, Cody went to work on the racket-ridden New York docks. Within a month after his release, he was arrested for burglary. The charge was later dismissed. He was arrested on another burglary charge July 25, 1942, and was released five days later.

Two days later, Cody was arrested for stealing a car, but was released the same day. On Oct. 19, 1942, he was nabbed for a store burglary. This time the charge stuck. He was sentenced to a 2-to-4-year term at Sing Sing.

Cody was paroled from Sing Sing Nov. 8, 1944 just 11 months later, he was arrested again, this time for attempted rape. Once again he was freed. His last known arrest was Sept. 7, 1947, when he was nabbed for mugging. He was charged with assault and robbery, but later released.

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John Cody
A Wrestler, Connections

Order Denying Motion.

On March 21, 1956, the Board issued a Decision and Order[1] in the above-entitled proceeding. Thereafter, on May 7, 1956, the Respondent filed a motion, with supporting affidavit, to reopen the record in the proceeding "for the purpose of permitting the Respondent to submit additional evidence, newly discovered, and upon receipt of such evidence, for an Order dismissing the complaint herein." The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Respondent's motion be, and it hereby is, denied on the ground that the newly discovered evidence of an impeaching nature is insufficient to disturb the findings of the Trial Examiner as set forth in his Intermediate Report issued December 15, 1955.

Dated, Washington, D. C., June 1, 1956.

By direction of the Board:

FRANK M. KLEILER,
Executive Secretary.

[1] 115 NLRB No. 127

Petition for Enforcement of an Order of the National Labor Relations Board.

To the Honorable, the Judges of the United States Court of Appeals for the Second Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Sunrise Lumber & Trim Corp., Massapequa, New York, its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "Sunrise Lumber & Trim Corp. and Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Case No. 2-CA-4406."

In support of this petition the Board respectfully shows:

(1) Respondent is a New York corporation engaged in business in the State of New York, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on March 21, 1956, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's Counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, and pursuant to Rule 13 (g)

of this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and certified list to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing those sections of the Board's said Order which relate specifically to the Respondent herein, and requiring Respondent, its officers, agents, successors and assigns, to comply therewith.

MARCEL MALLET-PREVOST,
Assistant General Counsel,

NATIONAL LABOR RELATIONS BOARD.

Dated at Washington, D. C.,
this 6 day of Aug., 1956.

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FILED
JUN 10 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~1071~~ 1176

SUNRISE LUMBER & TRIM CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

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Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Sunrise Lumber & Trim Corp. respectfully prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit, entered March 11, 1957, enforcing against your petitioner an order of the National Labor Relations Board, dated March 21, 1956, insofar as the decree directs the Petitioner to bargain collectively with Local 282 of the International Brotherhood of Teamsters and to reinstate four former employees with back pay.

Citations to Opinions Below

The Intermediate Report of the Trial Examiner is unreported and is printed in "Appendix to Petitioner's Brief" in the Court of Appeals* at page 158.

*Hereinafter cited as "Board's Appendix" or "B. A."

The opinion of the National Labor Relations Board is reported, as part of its Decision and Order at 115 N. L. R. B. No. 127 (1956) and is also printed in the record below at B. A. page 190. The opinion of the Court of Appeals appears at 240 F. 2d 620 and, together with the Decree sought to be enforced, have been reproduced as appendices hereto.

Jurisdiction

The jurisdiction of this Court is invoked under 62 Stat. 928; 28 U. S. C. Section 1254 (1).

Questions Presented

1. May The National Labor Relations Board Under Section 10 Of The National Labor Relations Act (As Amended) In An Unfair Labor Practice Proceeding Resulting From A Charge Filed By A Union Direct An Employer To Bargain With Said Union After Said Union First Filed A Petition For Certification Under Section 9 Of Said Act And Later Withdraw Said Petition?

2. May The National Labor Relations Board Direct An Employer To Bargain With A Union And To Offer Reinstatement With Back-Pay To Employees Who Went On Strike To Secure The Union's Demand For A Contract Containing An Unlawful Union Security Clause?

Statutes Involved

As to question 1, the statutory provision involved is Section 9 of the National Labor Relations Act as amended 61 Stat. 136, 140 29 U. S. C. (Secs. 151,

158 (d)), particularly Section 9 (c) (1), the text of which follows:

"Representatives and Elections"

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

As to question 2, the statutory provision involved is Section 8 (a) (3) of the said Act. The text is as follows:

"Unfair Labor Practices"

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-

membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

Statement

The Petitioner operates a country lumber yard in Massapequa, New York. On March 19, 1955, at a time when the Petitioner employed 14 full time and 6 regular part-time workers, Petitioner's president, Francis Tursi was approached by John Cody, a business agent of Local 282 of the Teamsters Union.

Cody told Tursi that he was there "to represent the men, and try to organize his (Tursi's) business" (B. A. 25). Tursi asked to see the six designation cards which Cody claimed to have but Cody refused to let him look at them (B. A. 25).

Heated words were exchanged and Tursi ordered Cody off his property. Before he left, Cody took a contract out of his pocket. He testified with respect thereto as follows: "I said, 'This is the thing we are looking for,' and he (Tursi) says, 'You better give that to my lawyer.'" (B. A. 25).

On March 24, 1955, the Union filed with the Second Region of the National Labor Relations Board a petition for an election. The unit requested being described as "Chauffeurs and Yardman, excluding foremen and millworkers" (B. A. 148).

On April 5, 1955, a joint conference on the petition was had at the Labor Board's office, in accordance with its practise, but the parties were unable to agree on the appropriateness of the unit. The Board scheduled a representation hearing for April 27, 1955. This hearing was postponed several times until on June 10, 1955, the Union filed a request to withdraw the petition, which request was approved by order of the Regional Director on June 14, 1955 (B. A. 148, 149).

Previously, on May 25, 1955 the union had filed the unfair labor practice charge and on June 13, 1955 filed a first amended charge (B. A. 1). Meanwhile, on March 25, 1955, Cody again appeared at the Petitioner's place of business and, with six of petitioner's employees, gave Tursi the standard form of Union agreement with a "sign or else" ultimatum.

That contract contains the following requirement:—

> "Members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (A. F. of L.) to be employed when available, otherwise those who will become members of Local 282 at its next meeting." (B. A. 153)

The six employees went on strike soon thereafter, but not before Tursi asked for and received permis-

sion from Cody to talk to the men (B. A. 31, 38, 152, 153).

Several days after the strike began, two of the employees asked to come back to work and were permitted to do so (B. A. 155). The other four picketed for several weeks, never made a request for re-employment until June 9, 1955 when counsel for the Union made a demand for their reinstatement. The demand, incidentally, included the name of one of the employees who had long since returned to work (B. A. 11, 12).

Unfair labor practice charges were prosecuted by the Board. The Order of the Board directed the Petitioner to bargain with Local 282, offer reinstatement to four employees with back pay and cease and desist from certain conduct found to be violative of the Act.

The Court of Appeals for the Second Circuit reviewed on petition by the National Labor Relations Board for enforcement under Section 10 (e) of the National Labor Relations Act, the petitioners being engaged in business within that circuit.

The Court below sustained the Board in all respects.

Reasons for Granting the Writ

The issues presented by this case raise questions of fundamental importance concerning the construction, intent, purpose, policy and administration of The National Labor Relations Act, as amended, with respect to which, in so far as counsel for the petitioner are informed, this Court has not passed judgment.

A With Respect to Question One

The Board, having approved the withdrawal by the union of a petition filed by the union for the determination of an appropriate unit and for an election under Section 9 of the Act, lacked power thereafter to determine the appropriate unit or the union's representative status in a proceeding under Section 10 of the Act and consequently the Board's determination is defective.

The power of the Board to determine the appropriate unit and the Union's representative status in a proceeding under Section 10, in the facts of this case, is not to be found in the Taft-Hartley Act. Its power to make such determination is strictly limited to a proceeding under Section 9. A comparison of the language used in the original Act and the Act as amended shows beyond question that such was the Congressional intent.

Thus, Section 9 (c) of the original (Wagner) Act provided, among other things:

> "* * * In such investigation the Board shall provide for an appropriate hearing upon due notice, *either in conjunction with a proceeding under Section 10 of this title or otherwise*, and may take a secret ballot of employees or utilize any other suitable method to ascertain such representatives." (Emphasis supplied.)

That procedure was changed, however, by the amendment of Section 9 (c) which now provides, among other things, that:

> "* * * The Board * * * shall provide for an ap-

propriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it *shall* direct an election by secret ballot and shall certify the results thereof." (Emphasis supplied.)

By deleting the enabling words "either in conjunction with a proceeding under Section 10 of this title or otherwise" from Section 9 (c) of the Wagner Act, and by providing in the place and stead thereof that the Board shall provide for an appropriate hearing upon due notice and shall direct an election and certify the results thereof, Congress manifested its intent to confine the powers of the Board in such matters to a proceeding under Section 9.

This Congressional intent to provide for separate and distinct proceedings is further shown by the provisions of Section 9 (d) which provides, among other things, that:

"Whenever an order of the Board made pursuant to Section 10 (c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 10 (c) of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall

be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript."

Nowhere in Section 10 of the Act is any language to be found authorizing the Board in a proceeding under that section to direct an employer to bargain with the union. Such a direction is equivalent to a certification under Section 9 of the Act.

By allowing the Union to withdraw its petition for a determination of the appropriate unit and for an election, the Board therefore divested itself of the power to make a determination as to the appropriate unit and the Union's representative status, and could not subsequently do so in a proceeding under Section 10.

If the Union's petition for a determination of the appropriate unit and for an election had not been withdrawn with the Board's approval, the Board might have consolidated the two proceedings (cf. Rules and Regulations, Series 6, Section 102.33; *National Labor Relations Board* v. *Dixie Shirt Co.*, 176 F. 2d 969 (C. A. 4). But when the petition was withdrawn with the Board's consent, there were no longer two proceedings pending and there could be no consolidation and no determination of the appropriate unit or the Union's representative status.

The respondent's position was grossly prejudiced by the Board's unwarranted procedure. It was deprived of a separate and distinct determination of the appropriate bargaining unit and the Union's representative status, uninfluenced and uncontaminated by the atmosphere of "unfair labor practice charges"

and its employees were deprived of their right under the Act freely to select their bargaining agent.

An examination of the chronology of events demonstrates that the Board's order to petitioner to bargain with the union awarded to the union a victory in an election which it requested but which was never held, covering employees who never designated the union as their bargaining agent. For all that appears, it may be that the union decided it could not win an election but would try to "get in" through an unfair labor practice charge. Here is the chronology of events: On June 10, 1955, the union filed its request to withdraw its petition for an election. On June 13, 1955 the union filed its amended unfair labor practice charge (B. A. 1) and on June 14, 1955 the Board approved the withdrawal of the union's petition, later convicted the employer of unfair labor practice charges and ordered it to bargain with the union, not under Section 9 but under Section 10 of the Act.

It is significant that, although throughout the hearing, the Board's Counsel had all of petitioner's employment records available, there is nothing in the record to show that a majority of the employees then in the employ of petitioner had signed cards for or designated this union to represent them. On the contrary, the record discloses that none of the six employees who so designated the union were in the employ of petitioner at the time of the hearing and as appears from the opinion of the Court of Appeals the two who had come back to work left their employment in May and June, 1955. The conclusion would follow therefor that if the petitioner is required to bargain with the union it would be bargaining for

employees who never designated or voted for this union. It is submitted that such a result, instead of effectuating the policies of the Act, would violate the fundamental policy of the Act, which is to permit employees freely to select their representatives for purposes of collective bargaining.

B With Respect to Question Two

The requirement in the standard Union agreement presented to and demanded of Petitioner that only members of the Union be employed calls for a closed shop, in violation of Section 8 (a) (3) of the Act.

While the contract contains what purports to be a "saving clause", that clause cannot be relied upon to remove the taint of illegality for the reason that the designation cards of the Union specifically authorizes a closed shop as the basis for Union representation. It reads as follows:

> "I, the undersigned employee of the Sunrise Lumber Co. hereby authorize the Drivers & Chauffeurs Union, Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, affiliated with the American Federation of Labor, to make an agreement with my employer, requiring membership in said labor organization as a condition of employment" (B. A. 10).

Since one, if not the principal, purpose of the strike was to force the petitioner to violate the Act, the strikers could not, perforce, be unfair labor practise strikers no direction to rehire with back pay could legally issue and petitioner could not legally be directed to bargain with the union.

It appears from the testimony that the employees who went on strike did so to get the contract presented to Tursi which they had all read and which set forth what they were going to get if they went into the union (B. A. 32, 87). They decided to stick with the union 100% and when Tursi refused to sign the contract they started to picket (B. A. 88).

The National Labor Relations Board, itself, has held that where employees strike for an unlawful union-security contract, employees participating therein are deemed to have forfeited their rights to protection under the Act and may be denied reinstatement. *Mackay Radio & Telegraph Co.*, 96 N. L. R. B. 740. The Board has, likewise, ruled that where a Union insists upon an unlawful union security clause, it will be deemed to have refused to bargain, in violation of 8 (b) (3) of the Act. *National Maritime Union*, 82 N. L. R. B. 1365; *American Radio Association*, 82 N. L. R. B. 1344; *National Maritime Union*, 78 N. L. R. B. 971.

The United States Circuit Court of Appeals for the Second Circuit enforced the Board's Order in *N. L. R. B.* v. *National Maritime Union*, 175 F. 2d 686, holding that insistence upon an illegal union security provision amounts to an "attempt to discriminate" even though no actual instance of discrimination can be shown.

The United States Court of Appeals for the Seventh Circuit has also had occasion to rule, in the case of *American Newspaper Publishers Assn.* v. *N. L. R. B.*, 193 F. 2d 782, that insistence upon closed shop conditions is an unlawful refusal to bargain.

Whether the National Labor Relations Board may, in the light of the amendment to Section 9 (c) of the Act, direct an employer to bargain in a proceeding under Section 10 of the Act, and whether the Board may direct the same employer to bargain when the Union with which it is directed to bargain has struck in support of unlawful contract demands are important questions of Federal Law which have not been, but should be settled by this Court.

It is submitted that the observation in the opinion of the Circuit Court to the effect that the union's demand for a closed shop was a matter to be resolved in the bargaining process and not an excuse for refusing to bargain at all, begs the very question at issue. It is clear from the contract demanded and from the designation cards signed by the six employees that the union refused to bargain and had no intention of bargaining on the issue of the closed shop, or any other issue, because the employees stated they were for the union's demands 100% (which, of course, included the demand for a closed shop) and they removed all possibility of bargaining when they struck to obtain the contract presented. Accordingly, they were either striking for a closed shop or economic demands, or both and hence were not entitled to reinstatement or back pay and the employer had no further duty to bargain.

CONCLUSION

The writ should run with respect to both questions presented.

Respectfully submitted,

JOSEPH T. KING
33 West 42nd Street
New York 36, N. Y.

ALEXANDER ELTMAN
350 Fifth Avenue
New York 1, N. Y.

Counsel for Petitioner

Dated: New York, N. Y.
June 7, 1957

APPENDIX A

Decree Sought to Be Enforced

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SUNRISE LUMBER & TRIM CORP.,

Respondent.

DECREE ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: Clark, Chief Judge, and Lumbard and Waterman, Circuit Judges.

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated March 21, 1956. The Court heard argument of respective counsel on January 9, 1957, and on February 18, 1957, being fully advised in the premises, handed down its decision enforcing said order of the Board. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that the Respondent, Sunrise Lumber & Trim Corp., Massapequa, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 282,

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, as the exclusive representative of the employees in the unit found appropriate in the Intermediate Report of the Trial Examiner of the National Labor Relations Board, dated December 15, 1955, with respect to rates of pay, wages, hours of employment and other conditions of employment:

(b) Discouraging membership in Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other labor organization of employees, by refusing to reinstate any of its employees because of their union membership or activity, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment;

(c) Offering its employees wage increases and other improved working conditions for the purpose of undermining their union activities;

(d) Soliciting its employees to discontinue protected concerted activities; and

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargain-

ing or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement in conformity with Section 8 (a) (3) of the National Labor Relations Act, as amended (hereinafter called the Act).

2. Take the following affirmative action, which the Board has found will effectuate the policies of the Act: –

(a) Upon request, bargain collectively with Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, as the exclusive representative of all the employees in the aforesaid appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement;

(b) Offer to Sylvestro Casillo, John Honer, Alexander Petrillo, and George Stephan immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges, in the manner set forth in the section of the aforementioned Intermediate Report entitled "The remedy";

(c) Make whole each of the employees specified in the paragraph above, in the manner set forth in the section of the aforementioned Intermediate Report entitled "The remedy," for any loss of pay he may have suffered as a result of the Respondent's discrimination against him;

(d) Preserve and make available to the Board or its agents, upon request, for examination and copying,

all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights to reinstatement under the terms of this Decree;

(e) Post in conspicuous places in its plant at Massapequa, New York, including places where notices to employees are customarily posted, copies of the notice attached hereto and marked Appendix. Copies of said notice, to be furnished by the Regional Director for the Second Region of the National Labor Relations Board, New York, New York, shall after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(f) Notify the aforesaid Regional Director in writing, within ten (10) days from the date of this Decree what steps the Respondent has taken to comply herewith.

J. EDWARD LUMBARD
Judge, United States Court of Appeals for the Second Circuit

STERRY R. WATERMAN
Judge, United States Court of Appeals for the Second Circuit

FILED: MARCH 11, 1957

Appendix A

Appendix

Notice to All Employees Pursuant to

A Decree of the United States Court of Appeals, Enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We will not discourage membership in Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other labor organization of our employees, by refusing to reinstate any of our employees because of their union membership or activity, or in any other manner discriminate in regard to their hire or tenure of employment or any term or condition of their employment.

We will not offer our employees wage increases or other improved working conditions for the purpose of undermining their union activities.

We will not solicit our employees to discontinue protected concerted activities.

We will not in any other manner interfere with, restrain or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other labor organization, to

bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement in conformity with Section 8 (a) (3) of the National Labor Relations Act.

WE WILL, upon request, bargain collectively with LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, as the exclusive representative of all employees in the following bargaining unit with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All truck drivers and yardmen.

WE WILL OFFER to the employees named below immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights or privileges, and make them whole for any loss of pay suffered as a result of our refusal to reinstate them.

Sylvestro Casillo
John Honer
Alexander Petrillo
George Stephan

Appendix A

All our employees are free to become or remain, or to refrain from becoming or remaining, members in good standing of the above-named union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the National Labor Relations Act.

SUNRISE LUMBER & TRIM CORP.
(Employer)

By .....
(Representative) (Title)

Dated .....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

Opinion of Circuit Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 115—October Term, 1956.

(Argued January 9, 1957 Decided February 18, 1957.)

Docket No. 24222

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

SUNRISE LUMBER & TRIM CORP.,
Respondent.

Before:

CLARK, *Chief Judge*,
LUMBARD and WATERMAN, *Circuit Judges*.

Petition by NLRB to enforce its order pursuant to decision against the respondent, reported at 115 N. L. R. B. No. 127 (1956). Petition granted.

THEOPHIL C. KAMMHOLZ, General Counsel, MARCEL MALLET-PREVOST, Asst. General Counsel; SAMUEL M. SINGER, NANCY M. SHERMAN, Attorneys, National Labor Relations Board, for Petitioner.

Appendix B

Joseph T. King, Alexander Eltman, New York City, for Respondent.

Waterman, *Circuit Judge:*

The National Relations Board petitions for enforcement of its order, reported at 115 N. L. R. B. No. 127 (1956), issued against the respondent, Sunrise Lumber & Trim Corp.

The facts relevant to our decision, as found by the Trial Examiner and adopted by the Board, are as follows: The respondent maintains its office and place of business at Massapequa, New York, where it is engaged in the manufacture and sale of lumber, milled products, building supplies, and related products. On March 18, 1955, three of the respondent's truckdrivers met with John Cody, the business agent of Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and signed cards that authorized the union to enter into an agreement with the respondent "requiring membership (in the union) as a condition of employment." On March 19 two more employees of respondent, another truckdriver and a yardman, signed similar cards. Also on that day Cody visited the respondent's mill and talked with Francis J. Tursi, the respondent's president. Cody and Tursi, who both testified at the Board hearings, differed vehemently in their recollections of this conversation, but the Trial Examiner adopted the former's version.

According to Cody's testimony, Cody told Tursi that he was at the mill for the purpose of representing the employees and that he was going to "try to

organize his business." Tursi asked which employees Cody was "going to organize," whereupon Cody said "the truckdrivers and one yardman." Tursi then asked Cody if he had any authorization cards. Cody answered that he had six, although only five had been signed at the time. Cody refused to let Tursi inspect the cards, but offered him a printed form contract, explaining that it "was what we (the union) are asking for." Tursi first told Cody to give the form contract to his lawyer, whom he did not identify. He then announced that it "was against his religion to be unionized," and ordered Cody off the mill premises.

On March 23 another of respondent's truckdrivers signed a union authorization card. The next day the union filed with the Regional Director a petition for a representation election, alleging that the appropriate bargaining unit consisted of the respondent's "chauffeurs and yardman."

On March 25 Cody visited the mill and talked to the six employees who had signed cards. They told Cody that they would strike, if necessary, in order to obtain recognition of the union. Cody informed Tursi of the decision. Tursi took the six employees into his office, where he discussed their grievances outside of Cody's presence. Three of the employees testified that Tursi made several offers of wage increases and other benefits conditioned upon the employees' disavowal of the union. The men rejected these offers, saying that they would not give up representation in the union. Once again Tursi replied that it was "against his religion" to have a union in the mill. The men returned to where Cody was waiting, received strike placards from him, and began picketing.

Shortly after the strike began, Tursi and Francis Ruiz, a foreman in respondent's mill, approached the employees on the picket line: Ruiz told the strikers that they were "damn fools" for not accepting Tursi's offers, and Tursi said that he would sell his own trucks and rent others before he would recognize the union. Within the next few days Tursi spoke to two of the strikers while they were picketing and offered them $25 each if they would unload a freight car. They both refused. A few days later Tursi told one of the striking employees that Tursi would make arrangements for him to install fences, sold by the company if he would buy a small truck necessary for the job. This offer was rejected.

On or about April 1 and 18, two of the strikers requested, and received, reinstatement. In May and June these two ceased work under circumstances that are not disclosed in the record and that are not alleged to have been unfair labor practices. On June 10 the attorney for the union wrote to the respondent demanding reinstatement of five employees, the four remaining strikers and one of the two who had been reinstated but whose employment had been severed before that date. On June 19th, the respondent's attorney wrote, in reply, that he would be "pleased to discuss" the demand. On June 22 the union attorney tried unsuccessfully to reach the respondent's attorney by telephone, and a day or two afterwards the latter attempted to return the call with a similar lack of success. This pattern, interrupted by the union attorney's vacation, was repeated several times during the summer of 1955. No further correspondence ensued, and the four remaining strikers were not offered reinstatement.

On these facts, the Trial Examiner found that the respondent had violated section 8 (a) (5) of the National Labor Relations Act, 29 U. S. C. A. paragraph 158 (a) (5), by refusing to bargain with the representative of the majority of its employees in an appropriate bargaining unit. In addition, respondent was found to have violated both sections 8 (a) (3) and 8 (a) (1) by discriminating against employees on the basis of union membership and by discouraging membership in a labor organization. The Board adopted the Trial Examiner's findings, and ordered the respondent to cease and desist from refusing to bargain with Local 282 and from interfering with the employees in the exercise of their rights under section 7 of the National Labor Relations Act, 29 U. S. C. A. paragraph 157. Affirmatively, the Board ordered the respondent to offer reinstatement with back pay to the four remaining strikers.

The respondent argues, inter alia, that it did not refuse to bargain with a representative of its employees because Local 282 never represented a majority of its employees in any appropriate bargaining unit. This argument is based on two contentions: (1) the Board incorrectly determined that an appropriate bargaining unit was comprised of eight employees who drove trucks and one yardman; (2) even if a unit so constituted was appropriate, Cody had indicated that his union was trying to organize the entire mill and therefore Tursi was justified in believing that the contemplated unit was not restricted to the truckdrivers and the yardman. We cannot accept either basis for this argument.

Appendix B

The Trial Examiner considered in great detail the duties, hours, and wages of the respondent's employees before concluding that an appropriate unit was composed of eight truckdrivers and one yardman. Cf. *Barton-Lingo Co.*, 91 N. L. R. B. 5 (1950). It rejected the union's contention that the six strikers alone constituted an appropriate unit, as well as the company's claim that nine more employees should have been included for an overall total of twenty. The Trial Examiner excluded others from the unit because of the part-time nature of their employment, the varying functions they performed, of their supervisor status in the operating of the mill. Of necessity, in a small organization such as that of respondent many of the employees perform overlapping functions. But we recognize the discretion that must be accorded to the Board in determing the appropriateness of a collective bargaining unit, and thus we will uphold such a determination unless it is "unreasonable and arbitrary." *Packard Motor Car Co.* v. *L. R. B.*, 330 U. S. 485, 491 (1947). There is no indication that the determination here was arbitrary or that it was motivated by improper considerations.

The respondent also argues that the Board was not empowered to determine the appropriate unit in this unfair labor practice proceeding, because it had previously approved the withdgawal by the union of its petition for a representation election. This position is wholly untenable, however, because it is the duty of an employer to bargain with the majority representative of its employees, whether or not that representative has been certified. See *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62.

71-72 (1956); *N. L. R. B.* v. *Dahlstrom Metallic Door Co.*, 112 F. 2d 756, 757 (2d Cir. 1940). This rule applies even where, as here, the majority representative has filed a representation petition that it subsequently withdraws after the employer's refusal to bargain. *Spitzer Motor Sales, Inc.*, 102 N. L. R. B. 437, 439, 443 (1953) enforced, 211 F. 2d 235 (2d Cir. 1954). And, of necessity, the Board must frequently determine the appropriateness of an alleged bargaining unit in order to pass upon a charge that an employer has refused to bargain with the majority representative of that unit.

Nor is respondent justified in its contention that the union's demand was for a mill-wide bargaining unit. Although the content of Cody's initial conversation with Tursi was disputed by the witnesses, it was clear to Tursi by March 25, the date of the strike, that the union sought to represent only the truckdrivers and the yardman. At that time Tursi's refusal to bargain was unquestionably attributable to his anti-union sentiments, rather than to his doubts about the majority status of Local 282. Cf. *N. L. R. B.* v. *Clearfield Cheese Co.*, 213 F. 2d 70, 73-74 (3d Cir. 1954).

The respondent also contends that the complaint should have been dismissed in its entirety because the union was demanding a closed shop provision that is illegal under the National Labor Relations Act. Assuming, arguendo, that the union was, in fact, demanding an illegal security clause, we hold that such a demand is a matter to be resolved in the bargaining process, not an excuse for refusing to bargain at all. *N. L. R. B.* v. *White Construction Co.*, 204 F. 2d 950, 953 (5th Cir. 1953). In addition, the

respondent argues that it was error to find a refusal to bargain with the union representative because Cody never offered to bargain; i. e., his demands were always couched in the form of an ultimatum. This contention must be readily dismissed, however, because there is substantial evidence in the record to support the Board's finding that Tursi's refusal to bargain with the union representative was motivated by his strong objection to unions and not by the particular terms of the printed form contract. This finding is further substantiated by Tursi's willingness to offer generous wage increases and other benefits to his employees on the condition that they would renounce the union.[1]

II

The respondent also urges that the Board erred in its finding that the striking employees were unfair labor practice strikers rather than economic strikers. The company claims that there was no support for its finding of violations of Sections 8(a)(1) and 8(a)(3). These contentions cannot be sustained, however. Three employees testified that at the closed meeting on March 25 Tursi was told that the employees would strike only if the company refused to bargain with their union representative. This testimony is

[1] An offer to raise wages conditioned on withdrawal from a union is evidence of a failure to bargain in good faith. *N. L. R. B.* v. *A. E. Nettleton Co.*, — F. 2d — (2d Cir. 1957), and negotiating directly with the employees without consulting their union representative constitutes a violation of paragraph 8(a)(1). See *May Department Stores* v. *N. L. R. B.*, 326 U. S. 376, 383-85 (1945).

reinforced by the strikers' rejection of the individual raise offers.

The respondent's actions clearly constituted a violation of Section 8 (a) (1), because it repeatedly attempted to interfere with the employees' rights under Section 7 of the Act. For example, it threatened to sell its own trucks and rent others, thereby abolishing the strikers' jobs. When such a step is motivated by a desire to interfere with the employees' rights under the Act, rather than by economic considerations, it constitutes a Section 8 (a) (1) violation. Cf. *N. L. R. B.* v. *Armstrong Tire & Rubber Co.*, 228 F. 2d 159 (5th Cir. 1955); *N. L. R. B.* v. *Nina Dye Works Co.*, 203 F. 2d 849 (3d Cir. 1953). In addition, the respondent violated both Sections 8 (a) (1) and 8 (a) (3) by failing to offer reinstatement to the strikers upon notice of such a request by the union attorney on June 10. The equivocal reply by the respondent's attorney was inadequate, because unfair labor practice strikers are entitled to reinstatement with back pay even if replacements for them have been made. *Mastro Plastics Corp.* v. *N. L. R. B.*, 350 U. S. 270, 278 (1956). Once put on notice by the original request, the respondent was obligated to offer reinstatement to all the strikers and its duty was not discharged merely by reinstating some of them.

III

Lastly, the respondent claims that the Board improperly denied its motion to reopen the record for the purpose of permitting the respondent to submit additional, newly discovered evidence. The evidence

sought to be introduced consisted of police records allegedly indicating that Cody had been convicted three times for various offenses. The respondent contends that this evidence came to its attention only because of a newspaper article appearing after the Board proceedings, and that its admission is crucial in view of the weight placed by the Trial Examiner on Cody's testimony. But the Board's refusal to reopen these proceedings was not an abuse of discretion inasmuch as the new evidence bore only on credibility. It is well settled that "newly discovered evidence, the effect of which is merely to discredit, contradict or impeach a witness does not afford a basis for the granting of a new trial." *Davis v. Yellow Cab Co.*, 220 F. 2d 790, 792 (5th Cir. 1955); *see United States v. Johnson*, 142 F. 2d 588, 592 (7th Cir. 1944), cert. dismissed, 323 U. S. 806; *United States v. Rutkin*, 208 F. 2d 647, 654 (3d Cir. 1953). Cf. *Mesarosh v. United States*, 352 U. S. 1, 9 (1956). In any event, there was sufficient testimony from witnesses other than Cody to establish the unfair labor practices of the respondent.

Petition granted.

No. 1071

In the Supreme Court of the United States

OCTOBER TERM, 1956

SUNRISE LUMBER & TRIM CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

JEROME D. FENTON,
General Counsel,

STEPHEN LEONARD,
Associate General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,
National Labor Relations Board,
Washington 25, D. C.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. B) is reported at 241 F. 2d 620. The findings of fact, conclusions of law, and order of the Board (R. 158-196) are reported at 115 NLRB 866.

JURISDICTION

The judgment of the court below (Pet. App. A) was entered on March 11, 1957. The petition for certiorari was filed on June 10, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254. See also Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

QUESTIONS PRESENTED

1. Whether Section 9(c) of the Act, which deals with the procedure by which labor organizations may secure formal Board certifications, precludes the Board from determining, in an unfair labor practice proceeding under Section 10, questions relating to the determination of the appropriate unit and to representation, where such issues are relevant to the charges of refusal to bargain.[1]

2. Whether in the circumstances of this case the Board properly found that petitioner's refusal to bargain with the Union and to reinstate strikers who struck in protest of such refusal constituted violations of the Act, even assuming that the Union in its initial request for a collective bargaining agreement demanded an unlawful union security provision.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151 *et seq.*), are set forth in the petition for certiorari, pp. 3-5.

STATEMENT

A. *The Board's findings of fact.* Briefly, the Board found that petitioner, in violation of Section 8(a) (1), (3) and (5) of the Act, restrained and coerced

[1] Although the court below dealt with this issue, it is doubtful whether petitioner, who did not urge this objection before the Board, can rely upon it at this stage. See *National Labor Relations Board* v. *Cheney Lumber Co.*, 327 U.S. 385, 387-389.

its employees in the exercise of their rights under the Act; denied reinstatement to four strikers who applied therefor; and refused to recognize and bargain with the majority representative of its employees in a unit appropriate for collective bargaining purposes. The subsidiary facts upon which the Board based its findings may be summarized as follows:

On March 18 and 19, 1955, five of petitioner's nine truck drivers and yardmen signed cards authorizing Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (hereinafter called the Union) to make an agreement with petitioner requiring membership in the Union as a condition of employment (R. 161; 8-10, 19-23, 55). Also, on March 19, Cody, the Union's business agent, told Tursi, petitioner's president, that he represented petitioner's employees and wanted to organize the plant (R. 161; 25, 28). Cody produced a printed form contract which he offered to Tursi, saying that it "was what we [the Union] were asking for" (R. 161; 25, 38-39). The contract, in addition to dealing with wages, hours of employment, seniority, etc., contained a union security clause providing, in Sec. 8(a) thereof, that 'Members of the * * * [Union are] to be employed when available, otherwise those who will become members of [the Union] at its next meeting" (R. 178-179; 15, 39, Resp. Exh. 2).[2]

---

[2] Section 8 of the contract also contained a "saving clause," reading as follows:

If Section 8(a) of this contract is in conflict with the

Company President Tursi refused to take the Union's form contract and told Cody to give it to his (Tursi's) lawyer whom, however, he did not identify. Tursi also stated that it "was against his religion to be unionized" and ordered Cody to "get * * * off of my property and stay off" (R. 161-162; 25-27).

On March 23, another employee in the unit signed an authorization card and on the following day, the Union filed with the Board a petition seeking certification as the bargaining representative of petitioner's "Chauffeurs and Yardman" (R. 162; 11, 24, 148).

The following day, March 25, Union Business Agent Cody met with the six Union employees and it was agreed that the men would strike, if necessary, to obtain recognition of the Union (R. 162; 31-32). Later, when Cody informed Tursi of this decision, Tursi decided to meet and talk with the employees (R. 162; 32, 86, 99).

In his talk to the employees, Tursi stated that he was opposed to the unionization of the mill and again

---

Labor Management Relations Act it is understood and agreed that such provision shall not be operative so long as such conflict exists but shall become operative immediately upon repeal of said Law or upon said Law being determined to be unconstitutional or inapplicable. If Section 8(a) is not operative for the foregoing reason then throughout the term of this agreement all employees shall be required, as a condition of employment, to become members of the Union on or after thirty (30) days following the beginning of employment or the effective date of this agreement whichever is the later. This requirement is subject to receipt of the necessary certification from the National Labor Relations Board.

said that it was "against his religion" to operate a unionized plant (R. 163; 60, 86, 100-103). He discussed with the employees their grievances regarding wages and hours and then offered them concessions conditioned on their disavowal of the Union (R. 163; 58-60, 87-88, 160). The men rejected this condition, stating that they wanted a union and that if necessary they would "go on strike" to obtain union recognition (R. 163; 60, 80-89, 101-102).

The same day, March 25, the employees picketed the plant (R. 163; 33, 89). Company President Tursi and Foreman Ruiz told the pickets they "were damned fools for not taking up Mr. Tursi's offers," and Tursi "kept repeating that it was against his religion, and he'd sell his trucks and rent trucks before he'd let the union in" (R. 164; 90). The employees replied that they "were going to stay there until [they] were recognized" (R. 164; 98). About a week later, Tursi offered two of the pickets $25 each if they would unload a freight car but both refused (R. 164; 62). Tursi also told one of the strikers that he would make arrangements for him to install fences sold by the Company if he would buy a small truck necessary for the job (R. 164; 67).

On May 24, the Union filed its initial charge of unfair labor practices in this proceeding (R. 164). On June 10, the Union requested petitioner to reinstate five employees, four of whom had been on strike until that date (R. 165, 11-12, 141).[3] Also on

[3] The fifth employee had abandoned the strike before the reinstatement request and already had been reinstated (R. 161; 155-156).

une 10, the Union, with the Regional Director's approval, withdrew its petition for representation (R. 64; 243).

B. *The Board's decision and order.* Upon the foregoing facts the Board found, in agreement with the trial examiner, that petitioner violated Section 8 (a) (5) and (1) of the Act by refusing to recognize and bargain with the Union, and by offering improved working conditions directly to the employees conditioned on their rejecting the Union (R. 176-177, 190). Contrary to petitioner's contention, the Board found that petitioner's nine truck drivers and yardmen constituted an appropriate unit for collective bargaining and that the Union had been designated by a majority of these employees as the bargaining representative (R. 165-175). The Board also rejected petitioner's contention that its refusal to bargain was justified because the form contract offered by Union Representative Cody to Company President Tursi on March 19 allegedly contained an illegal union security clause, stating (R. 179):

> * * * the issues herein [do not] require a determination of the alleged invalidity of the [union security] provision. If it be assumed *arguendo* that the provision contravenes the Act, its existence in the proposed contract did not relieve the [Company] of the obligation to recognize the Union and to bargain collectively. *N.L.R.B.* v. *White Construction Co.*, 204 F. 2d 950 (C.A. 5). Moreover, the provision was not mentioned in Tursi's conversations with Cody or the employees, insofar as the record discloses, and the purpose of the strike was not to force

the Company to agree to the provision. The purpose instead, as the reliable evidence fully establishes, was to overcome the Company's opposition to the principle of collective bargaining.

The Board further found that petitioner violated Section 8(a)(1) of the Act by threatening to abolish the strikers' jobs rather than recognize the Union and by soliciting the employees to return to work (R. 177-178). Finally, the Board found that because the employees struck in protest against petitioner's unlawful refusal to bargain with the Union petitioner's failure to offer four of them reinstatement upon their application violated Section 8(a)(3) and (1) of the Act (R. 178-181).

The Board's order (R. 191-194) requires petitioner to cease and desist from the unfair labor practices found; to bargain with the Union upon request; and to offer reinstatement to those strikers not already reinstated and make them whole for any loss of pay they may have suffered as a result of the discrimination against them.

C. *The decision of the court below.* The court below affirmed the Board's findings and enforced the order in full. Rejecting petitioner's contention, raised for the first time in the enforcement proceeding (see *supra*, p. 2, n. 1), that the Board was not empowered to determine the appropriate unit or the Union's right to represent the unit in the unfair labor practice proceeding because the Board had previously approved the withdrawal by the Union

of its petition for a representation election, the court below stated (Pet. App. B, 6-7):

> This position is wholly untenable, however, because it is the duty of an employer to bargain with the majority representative of its employes whether or not that representative has been certified. * * *. This rule applies even where, as here, the majority representative has filed a representation petition, that it subsequently withdraws after the employer's refusal to bargain. * * * And, of necessity, the Board must frequently determine the appropriateness of an alleged bargaining unit in order to pass upon a charge that an employer has refused to bargain with the majority representative of that unit.

The court below also rejected petitioner's contention that its refusal to bargain was justified on the alleged ground that the Union demanded an illegal closed shop clause in the proposed contract offered by Union Representative Cody to Company President Tursi at their initial meeting on March 19, 1955. The court below stated (Pet. App. B, 7-8):

> Assuming, *arguendo*, that the union was, in fact, demanding an illegal security clause, we hold that such a demand is a matter to be resolved in the bargaining process, not an excuse for refusing to bargain at all. * * * [T]here is substantial evidence in the record to support the Board's finding that Tursi's refusal to bargain with the union representative was motivated by his strong objection to unions and not by the particular terms of the printed form contract.

ARGUMENT

1. Petitioner's contention (Pet. 8-12) that the Board was without power to determine in the unfair labor practice proceeding the appropriate unit and the Union's majority status presents no question warranting review by this Court. It is well settled that normally "the right of employees to bargain collectively through an exclusive bargaining representative is not conditioned upon an antecedent certification by the Board where, as here, the majority status of the union is clearly established otherwise." *National Labor Relations Board* v. *Kobritz*, 193 F. 2d 8, 14 (C.A. 1). See also *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72; *National Labor Relations Board* v. *Trimfit of California, Inc.*, 211 F. 2d 206, 209 (C.A. 9). It is clear, therefore, as the court below held (Pet. App. B. 7), that "of necessity, the Board must frequently determine the appropriateness of an alleged bargaining unit in order to pass upon a charge [filed in a Section 10 proceeding] that an employer has refused to bargain with the majority representative of that unit." Accordingly, the courts of appeals have, after the Taft-Hartley Act as before, uniformly upheld Board determinations of relevant representation questions in unfair labor practice proceedings, even though no petition for certification was ever filed by the union or, if filed, was later withdrawn by the union. See, *National Labor Relations Board* v. *Ken Rose Motors, Inc.*, 193 F. 2d 769, 771 (C.A. 1); *National Labor Relations Board* v. *Epstein*, 203 F. 2d 482, 483-484 (C.A. 3), certiorari denied, 347 U.S. 912; *National*

abor Relations Board v. *Armco Drainage & Metal Products, Inc.*, 220 F. 2d 573, 576-577 (C.A. 6), ertiorari denied, 350 U.S. 838; *National Labor Relations Board* v. *Hunter Engineering Co.*, 215 F. 2d 16, 920-923 (C.A. 8); *Motorola, Inc.* v. *National Labor Relations Board*, 199 F. 2d 82, 83 (C.A. 9), ertiorari denied, 344 U.S. 913; *National Labor Relations Board* v. *Trimfit of California, Inc.*, 211 F. d 206, 209 (C.A. 9).

Petitioner's reliance (Pet. 8) on the changes in he language of Section 9(c), made by the Taft-Hartley Act, in support of the claim that the Board's power to make unit and representation determinations "is strictly limited to a proceeding under Section 9," is misplaced. Section 9 (c) deals only with he procedure by which unions may secure formal ertification from the Board. Nothing in the statute r its legislative history suggests that the amendment was intended to preclude the Board from determining representation questions without formal ertification when relevant in unfair labor practice roceedings.

Equally misplaced is petitioner's reliance on Section 9(d) of the amended Act, which provides that [w]henever an order of the Board made pursuant to ection 10(c) is based in whole or in part upon acts certified following an investigation" in a representation proceeding, "such certification and the record of such investigation shall be included in the ranscript of the entire record filed in the court here the order is sought to be enforced. The Act oes not permit direct review of Section 9 representa-

tion proceedings by the courts of appeals as it does of unfair labor practice orders issued under Section 10 of the Act. *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401. The sole purpose of Section 9(d) is to afford a review of a Board determination in representation proceedings and the underlying record when it is the basis for an unfair labor practice order under Section 10 of the Act.

2. Petitioner's Question No. 2, putting in issue the power of the Board to "direct an employer to bargain with a union and to offer reinstatement with back pay to employees who went on strike to secure the union's demand for a contract containing an unlawful union security" (Pet. 2, 14), is predicated on the erroneous premise that petitioner's refusal to bargain was in fact motivated by the alleged illegal demand and that the strikers' walkout was primarily called to enforce such demand. Rejecting this premise, the Board found that the allegedly illegal clause was not even "mentioned" by petitioner in its dealings with the Union and, further, that the purpose of the strike "was not to force [petitioner] to agree to the provision" but, rather, "to overcome [petitioner's] opposition to the principle of collective bargaining" (*supra*, pp. 6-7). This finding, as the court below held, is amply supported by the record.

Moreover, as the court below held (Pet. App. B, 7-8), "Assuming, *arguendo*, that the union was, in fact, demanding an illegal security clause * * * such a demand is a matter to be resolved in the bargaining process, not an excuse for refusing to bargain at all." Accord: *National Labor Relations*

Board v. *White Construction and Engineering Co., Inc.*, 204 F. 2d 950, 953 (C.A. 5). The cases relied on by petitioner (Pet. 13) are not in conflict with the ruling below. In those cases the unions adamantly insisted (by threats of strikes or otherwise) on the employer's acceptance of the illegal union security provisions as a condition for concluding a contract.

CONCLUSION

The decision of the court below is plainly correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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